zen decision

erg, who is
memoran-
ice.

matter of
mediately
row) and
us (Judge
Friday.

[illegible]

[illegible]

[illegible]

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statute Involved	3
Questions Presented	3
Statement of the Case	6
Summary of Arguments	8
Argument	20
I. The District Court Erred in Placing the Burden Upon the Legislators to Show that their Senate Reapportionment Plan was Constitutionally Valid and Justifiable	20
II. The District Court Abused its Discretion in Judicially Attempting to Structure the Various Factors Involved in the Development of Fair and Effective Representation for Each Voter in the Hawaii Legislature	26
A. The Legislature is but One Facet of Government which Requires Proper Structuring in Achieving Fair and Effective Representation for all Citizens and the Structuring of Each Facet to Achieve this Basic Aim Depends on the Structure of Many Relevant Factors	27
B. The Structuring and Employment of the Various Factors in Legislative Apportionment Require to a Great Degree the Exercise of Judgment Better Accomplished by the Body Politic Rather than the Judiciary	30

Page

III. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not Require that One House, at least, of Hawai'i's Bicameral Legislature be Apportioned on the Basis of Single-Member Districts 32

A. The Equal Protection Clause Does not per se Require that One House at Least of a State Bicameral Legislature be Apportioned Among Single-Member Districts 32

B. Multi-Member Districts in the Senate Reapportionment Plan were Fashioned upon Policy Considerations and Relevant Factors and thus Cannot be Said to be Arbitrary, Irrational or as Reflecting no Policy 35

1. The Selection of Single-Member Districting on Multi-Member Districting System is Rooted in Public Policy Considerations 35

2. Multi-Member Districting System for the Hawaii Senate was Based on Policy Considerations 38

3. The Selection of Multi-Member Districts for the Hawaii Senate was Influenced by the Shape of Other Existing Factors 40

C. The Proposed Senatorial District Boundaries are not Arbitrarily Drawn, nor are They Without Rational Basis 46

Page

1. Even if it is Assumed that there is Some Unequal Treatment of Voters of Some Districts, it Cannot be Said that the Proposed Senatorial Districts were Aligned Arbitrarily or Without Rationality. The Proposed Senatorial District Boundaries Follow Closely Geographic, Historical and Natural Lines and Adhere to the Principles of Compactness and Contiguity 49

2. The Fact that One Proposed Senatorial District and a Representative District have the Same Geographical Boundaries and that Another Proposed Senatorial District and a Representative District have Nearly Identical Boundaries does not Render the Senate Districting Plan Arbitrary or Irrational 51

3. The District Court's Intimation that the Drawing of the Senatorial District Lines was Accomplished in Part by Gerrymandering is Without Substance 53

D. There is no Evidence that Hawaii's Multi-Member Districting System Overrepresents the Larger Multi-Member Districts or Submerges the Minority in the Multi-Member Districts or Denigrates Majority Rule..... 54

1. There is no Evidence Showing that the Senate Multi-Member Districting System Overrepresents the Larger Multi-Member Districts 55

Page

2. The Fact that Some Multi-Member Senatorial Districts and Some Representative Districts have the Same or Nearly Identical Boundary Lines does not Result in Disproportionate Representational Advantage for the Voters of These Districts Over Other Voters of the State 58

3. There is no Evidence Showing that the Senate Multi-Member Districting System Submerges Minorities 59

4. The Multi-Member Districting System does not denigrate the Principle of Majority Rule 61

IV. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not Require the Formation of Homogeneous Districts Based on Ethnic, Political, Socio-Economic, Industrial and Occupational Complexion in the Apportionment of the Hawaii State Legislature, nor does it Require that Each of these Divergent Interests have Potentially Equal Representation in the State Legislature 63

A. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States Focuses its Attention upon the Protection of Individuals, not Interest Groups 64

B. Practical Problems Militate Against the Construction of Legislature Districts Around Homogeneous Interest Groups 66

Page

1. There is no Practical Way of Determining the Relevant Minority Interest Groups Which are Entitled to Representation in the State Legislature 66

2. The Difficulty in Identifying Relevant Groups Entitled to Representation in the State Legislature was Apparent in the Hawaii Reapportionment Case 69

C. The Construction of Legislative Districts Along Homogeneous Characteristics of the People will Tend to Subvert the Equal Populations Principle 71

D. The Role of Minority Interest Groups in Representative System of Government is for the Political Body to Determine and is Better Accomplished by the Political Body..... 72

V. The District Court Abused its Discretion in Enjoining the Legislature from Enacting Legislation until a Reapportionment Legislation Satisfactory to the Court had been Enacted 75

VI. The Hawaii Legislature has the Power to Enact at Least a Provisional Reapportionment Plan for the Senate, Pending Adoption of a Valid Constitutional Amendment, and to Propose Such Constitutional Amendment by Statute..... 80

Page

A. The District Court Erred in Precluding the Formulation by the Hawaii Legislature of at Least a Provisional Senate Reapportionment Plan, Pending the Adoption of a Valid Amendment to the Constitution of the State of Hawaii. The Injunction Makes no Provision for the Enactment by the Hawaii Legislature of any Reapportionment Plan for the Senate 81

B. The District Court Erred in Precluding the Hawaii Legislature from Proposing Necessary Constitutional Amendment for Submission to the Electorate 82

C. The District Court Erred in Ordering that a Constitutionally Acceptable Legislative Apportionment Plan be in Effect for the 1966 General Elections 83

VII. The Refusal of the District Court to Invalidate all Portions of the Hawaii Constitution Relating to Legislative Apportionment, Except that Portion Relating to the Apportionment of the Senate, was Proper 84

A. The District Court's Refusal to Invalidate that Portion of the Hawaii Constitution Relating to the Apportionment of the House of Representatives was Proper 85

Page

B. The District Court's Refusal to Invalidate that Portion of the Hawaii Constitution Relating to the Numerical Sizes of the House and the Senate, the Restrictions on Changes in House District Boundaries on Decennial Reapportionments, and the Last General Election as the Basis for Determining the Number of Voters Registered on Decennial Reapportionments was proper 89

1. Numerical Sizes 89

2. Restrictions on Changes in the House District Boundaries 91

3. Decennial Reapportionment 93

4. The District Court's Failure to Invalidate all Portions of the Hawaii Constitution Relating to the Apportionment and Reapportionment of Both the Senate and House Cannot be Said to have Made the Task of the Legislature more Difficult by Limiting the Choices in any Reapportionment Plan 94

VIII. The District Court Correctly Held that "Registered Voters" is a Constitutionally Valid Measure of "Population" in the Apportionment of the Senate and the House of Representatives of the Hawaii Legislature 95

Page

A. "Registered Voters" is a Permissible Basis upon which the State Legislature may be Apportioned in Complying with the Requirements of the Equal-Populations Principle under the Equal Protection Clause 96

B. The Use of the Census Total Population in Hawaii to Measure "Equal-Population" tends to Dilute the Weight of the Vote of Voters in Districts where a Smaller Number of Non-voters Reside 100

1. Hawaii's Census "Total Population" Figure Does not Accurately Reflect the Number of Citizen-Residents and Inhabitants of Hawaii 101

2. To Base Hawaii Legislative Apportionment on "Total Population" Would Result in the Election of a Number of Legislators in a Number of Districts with Relatively Small Number of Voters per Legislator as Compared to the Number of Voters per Legislator in Other Districts 102

C. There is a Direct and Reliable Relationship Between the Number of Registered Voters the Number of Civilian Population in Hawaii and the Ratio of Registered Voters to the Civilian Population is Relatively Stable 105

D. The "Registered Voters" Measure does not Discriminate Against Certain Segments of the State's Population 107

Page

IX. The Use of the Multi-Member Districting System For the House of Representatives Does Not Violate the Equal Protection Clause of the Fourteenth Amendment 109

A. The Employment of Multi-Member Districts for the House is Grounded upon Public Policy Considerations and Judgmental Decision made Upon Existing State of Facts 111

B. The Employment of Multi-Member Districts in the House of Representatives has not been Demonstrated to Result in any invidious Discrimination 113

Conclusion 116

APPENDICES:

A. Constitutional and Statutory Provisions:

1. Amendment XIV, Section 1, Constitution of the United States 1a
2. Article III, Sections 1, 2, 3, 4 and 5, Constitution of the State of Hawaii 1a
3. Article XVI, Section 1, Constitution of the State of Hawaii 4a
4. Article XV, Sections 1, 2, 3 and 4, Constitution of the State of Hawaii 11a
5. H.B. 987, Act 281, Session Laws of Hawaii, Regular Session 1965 ..... 14a

B. Memorandum to Judge Pence from Judge Beeks ... 20a

CASES:

CITATIONS

Page

Allied Stores, Inc., v. Bowers, 358 U.S. 522 (1959) 23
Baker v. Carr, 369 U.S. 186 (1962) 23, 31
Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (1964) 32, 33
Davis v. Mann, 377 U.S. 678 (1964) 79, 104, 105
Drew v. Scranton, 229 F.Supp. 310 (M.D. Pa. 1964) 56
Fortson v. Dorsey, 379 U.S. 433 (1965) 9, 11, 25, 34, 55, 56, 57, 59, 64, 115
Fortson v. Toombs, 379 U.S. 621 (1965) 76, 78
Gomillion v. Lightfoot, 364, U.S. 339 (1960) 23
Gray v. Sanders, 372 U.S. 368 (1963) 31, 96, 97, 102
Lindsley v. Natural Carbonic Gas Co. 220 U.S. 61 ( ) 22, 24
Lisco v. Nichols, 208 F. Supp. 471 (1962) 24
Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964) 34, 87, 88, 110, 115
Luther v. Borden, 7 How. 1, 12 L.Ed. 581 30
Maryland Committee v. Tawes, 377 U.S. 656 (1964) 15, 79, 81, 82, 85, 86, 87, 110
McGowen v. Maryland, 366 U.S. 420 (1961) 24, 47, 112
Morey v. Doud, 354 U.S. 457 (1957) 21, 22, 23, 24, 47, 112
Reynolds v. Sims, 377 U.S. 533 (1964) 21, 23, 27, 28, 29, 30, 31, 33, 34, 42, 45, 46, 47, 49, 51, 64, 65, 71, 77, 79, 84, 90, 92, 97, 98
Roman v. Sincock, 377 U.S. 695 (1964) 78, 82, 84
Wesberry v. Sanders, 376 U.S. 1. (1964) 98
WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) 98

CONSTITUTIONAL PROVISIONS AND STATUTES:

28 U.S.C. § 1253 3
28 U.S.C. § 1343 2

Page

CASES:

28 U.S.C. § 2101 (b) 3
28 U.S.C. § 2201 2
28 U.S.C. § 2202 2
28 U.S.C. § 2281 2
28 U.S.C. § 2284 2
42 U.S.C. § 1983 2
42 U.S.C. § 1988 2
U.S. Constitution, Amendment XIV, Section 1 ..... passim
Organic Act of the Territory of Hawaii, 31 Stat. 152 (1900) 45, 104, 112
Act 281, Session Laws of Hawaii, Regular Session of 1965 ..... 3, 7
Hawaii Constitution, Article III 3, 15, 81, 84, 85, 91, 92, 93, 94, 95
Hawaii Constitution, Article XV 3, 14, 82
Hawaii Constitution, Article XVI 3
House Bill 773, Third Hawaii Legislature, Regular Session, 1965 7
House Bill 986, Third Hawaii Legislature, Regular Session, 1965 7
House Bill 987, Third Hawaii Legislature, Regular Session, 1965 ..... 5, 7

MISCELLANEOUS:

ADVISORY COMMISSION ON INTER-GOVERNMENTAL RELATIONS REPORT A-15 (1962) 93, 99, 100
DE GRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT (1963) 29, 72

CASES:

Page

Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367 (1963) 25, 62

Dixon, *Crucial Issues in Reapportionment is Between Majoritarian Democracy and Consensus Democracy*, 1963 NAT'L CIVIC REV. 543 ..... 60, 62, 67

Dixon, *Reapportionment in the Supreme Court and Congress; Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209 (1964) 28, 62

Israel, *Nonpopulation Factors Relevant to an Acceptable Standards of Apportionment*, 38 NOTRE DAME LAW. 499 (1963) 24

Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker V. Carr*, 61 MICH. L. REV. 711 (1963) 69, 72, 74, 75

McKay, *The Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487 (1963) 60, 67

Silva, *Compared Values of the Single and the Multi-Member Legislative District*, 17 THE WESTERN POLITICAL QUARTERLY 504 (1964) 36, 37, 62

Silva, *Making Votes Count: Arguments Advanced For Basing Representation on Electors Turning Out Rather Than Population*, 1963 NAT'L CIVIC REV. 489 103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,

Appellant,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

ELMER F. CRAVALHO, *et al.*,

Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

KAZUHISA ABE, *et al.*,

Appellants,

—v.—

WILLIAM S. RICHARDSON, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR KAZUHISA ABE, et al.

OPINIONS BELOW

The opinions of the District Court from which this appeal is taken are as follows: Decision and Order, dated February 17, 1965, entered on April 9, 1965, reported at 238 F.Supp. 468, and appearing at R. 62-81; Decision and Order, dated and entered on April 28, 1965, reported at 240 F.Supp. 724, and appearing at R. 151-65.

An order dated and entered on March 9, 1965, which granted a motion to alter or amend the judgment of February 17, 1965, is unreported and appears at R. 88-91. An informal memorandum opinion, dated March 31, 1965, is attached as Appendix B to this brief, pp. 20a to 21a, *infra*.

JURISDICTION

The plaintiffs brought suit under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. §§ 1343, and 28 U.S.C. §§ 2201, 2202. A three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281 and 2284.

The District Court's first order, dated February 17, 1965, was entered on April 9, 1965 (R. 195). Upon motion of intervening-defendants (R. 83-88), the District Court issued an order, dated and entered on March 9, 1965 (R. 88-91), suspending temporarily its order of February 17, 1965. The District Court then issued its order dated and entered on April 28, 1965 (R. 151-65), which reinstated the provisions of the order of February 17, 1965.

Notice of appeal was timely filed by these appellants in Case No. 409 on May 7, 1965. (R. 184) Separate notices of appeal were timely filed by the Governor of Hawaii in Case No. 318 on May 3, 1965 (R. 165), and by Elmer F. Cravalho, et al., in Case No. 323 on May 7, 1965 (R. 180).

The Supreme Court of the United States has jurisdiction to review by direct appeal the decisions and orders of the District Court under the provisions of 28 U.S.C. §§ 1253 and 2101 (b).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions and statute involved in this case are:

1. Amendment XIV, Section 1, Constitution of the United States.

2. Article III, Sections 1, 2, 3, 4 and 5, Constitution of the State of Hawaii.

3. Article XVI, Section 1, Constitution of the State of Hawaii.

4. Article XV, Sections 1, 2, 3 and 4, Constitution of the State of Hawaii.

5. Act 281, Session Laws of Hawaii, Regular Session of 1965, Vol. 1.

The texts of the above constitutional and statutory provisions are set forth in Appendix A (pp. 1a to 21a, *infra*).

QUESTIONS PRESENTED

The following questions are presented in the appeal of these appellants in Case No. 409.[1]

---

[1]This brief is not only an opening brief in Case No. 409, but an answering brief as well in Case No. 318, pursuant to stipulation among the parties (see p. 6, *infra*.). Thus, this brief discusses not only the questions raised by these Appellants in No. 409 but also those questions raised in the brief of Appellants in No. 318.

1. Where the Hawaii Legislature has reapportioned the Senate among senatorial districts containing substantially equal population per senator, does the Legislature have the burden of showing that the Senate reapportionment plan does not operate to minimize or cancel out the voting strength of political, social, economic or racial elements of the voting population and that it is otherwise constitutionally justifiable, or do the opponents of the plan have the burden of demonstrating that the plan is invidious or otherwise constitutionally invalid?

2. Did the District Court abuse its discretion in attempting judicially to structure and employ the various factors, other than population base, which enter into consideration in the development of fair and effective representation for all voters in the Hawaii Legislature?

3. Within the constitutional limitations imposed by "equal weight" and "equal population" principles, does the Fourteenth Amendment permit the exercise of political judgment in the fashioning, structuring, balancing and employment of other factors in the development of fair and effective representation for all voters in the State Legislature?

4. Does the Fourteenth Amendment to the Constitution of the United States require that at least one of the two houses of the Hawaii Legislature be apportioned on the basis of single-member districts unless valid and compelling reasons are shown for the creation of multi-member districts?

5. Does the fact that the geographical boundaries of certain senatorial districts of the Hawaii Legislature are identical to or coincide to a great degree with the geographical boundaries of certain representative districts cause the votes of Hawaii citizens to be unequal in weight

or otherwise violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

6. Was the District Court justified in finding that the Senate reapportionment plan (H.B. 987), submitted by the Hawaii Legislature to the District Court on April 14, 1965, was the result of gerrymandering and thus arbitrary and capricious and violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, simply because two or more incumbent Senators within some proposed multi-member districts happened to reside within short distances of each other?

7. Does the Fourteenth Amendment to the Constitution of the United States require the creation of legislative districts which are substantially homogeneous in racial, political, occupational, industrial, and socio-economic complexion, with each such grouping having potentially equal representation?

8. Did the District Court, in seeking to compel reapportionment, abuse its discretion through the employment of excessive and drastic measures, to-wit: prohibiting the Hawaii Legislature from enacting legislation essential to the normal operations of Hawaii State and municipal governments and essential for the continuation of programs necessary for the health and welfare of the people of Hawaii until such time as reapportionment legislation had been passed to the satisfaction of the District Court?

9. Does the legislature of the State of Hawaii have the power to enact at least temporary and provisional reapportionment legislation relating to the Hawaii Senate, pending the adoption of amendments to the Hawaii Constitu-

tion providing for the reapportionment of the Hawaii Senate which meet the requirements of the United States Constitution?

10. Did the District Court abuse its discretion in requiring that a permanent reapportionment plan for the Senate, at least, of the Hawaii Legislature be in effect by the November 1966 general elections, and by requiring that the State constitutional amendments necessary to bring about such permanent plan must be proposed by a constitutional convention rather than by the Legislature?

11. Does the Senate Reapportionment Plan submitted by the Hawaii Legislature to the District Court on April 14, 1965, violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Case Nos. 318, 323 and 409 have been consolidated for purposes of appeal by order of this Court. (R. 412) By stipulation of the parties in all three cases, this brief is intended to serve as the opening brief of Appellants in No. 409 and at the same time as their answering brief in Case No. 318. For purposes of all three cases, Appellants in No. 409 accept substantially the Statement contained in the brief of Appellant in No. 318, with these additions:

District Court's February Order. With respect to the apportionment of the House of Representatives of the Hawaii Legislature, the District Court ruled: "The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action." (R. 79-80)

The Legislature's Senate Plan. On April 14, 1965, the Legislature, pursuant to the District Court's order of March 9, 1965, passed and sent to the District Court the following three bills: (1) H.B. 987 (now Act 281, Session Laws of Hawaii, Regular Session of 1965, Vol. 1) providing for provisional reapportionment of the Senate; (Appendix A, pp. 14a to 19a, *infra.*) (2) H.B. 773, a proposed constitutional amendment embodying the terms of the provisional plan; and (3) H.B. 986, a statute calling for the submission to the electorate at the 1966 general election of the question whether or not a constitutional convention should be convened.

H.B. 987 was the subject of the District Court's scrutiny and is the Senate Reapportionment Plan, the validity of which is the question before this Court. In the light of its decision on H.B. 987, the District Court did not find it necessary to pass on the validity of H.B. 773 and H.B. 986. (R. 164)

The District Court's Decision of April 28, 1965. The District Court found that the Senate Reapportionment Plan conformed to the standards of equal proportions. (R. 155; 240 F.Supp. at 727) It found that the proposed senatorial districts followed established geographical, historical and natural lines (R. 156, 157), and adhered to the principles of compactness and contiguity (R. 161). Robert Schmitt, the expert witness, was of the opinion that the senatorial districts were well thought out (R. 317) and that there was considerable amount of logic and meaningfulness in the district lines (R. 325). The District Court, however, nonetheless held the Senate Reapportionment Plan unacceptable and held that at least one house of the Hawaii bicameral Legislature must be apportioned among single-member districts (R. 162-63), that the districts must be homogeneous in their ethnic, socio-economic, political, industrial and oc-

cupational complexion and each such group must have potentially equal representation (R. 157-58) and that no senatorial district boundary lines may be identical or nearly identical to the boundary lines of any representative district (R. 160-61).

SUMMARY OF ARGUMENTS

I. The District Court erred in placing the burden upon the Legislature to justify its proposed Senate Reapportionment Plan and to justify the creation of multi-member districts for the Senate. Placing the burden upon the Legislators was contrary to the usual rules of procedure employed in Equal Protection cases whereby the one attacking the legislation from which unequal treatment is alleged to arise has the burden of demonstrating the invidiousness of the classification. This was especially so in the light of the adherence on the part of the Legislature to the equal-populations principle in the proposed reapportionment of the Senate.

II. The District Court erred in attempting to structure judicially those factors which are parts and parcels of any governmental system designed to achieve fair and effective representation for all citizens and the structuring of which entails policy determinations and judgmental decisions in the light of the political community's philosophy, experience and development and the existing state of affairs. The District Court left no room for judgment by the political community when it mandated that at least one house of a bicameral legislature must be apportioned on a single-member districting system, that the legislative districts must be homogeneous, based on the economic, social, occupational, industrial and ethnic characteristics of the people, and that the district boundaries of one house of the Hawaii Legislature must not be identical in all cases with the district

boundaries of the other house. The Legislature is but one facet of government which requires structuring in achieving fair and effective representation for all, and how the Legislature is apportioned depends to a great extent on the existing structure of these other facets and upon the shape of various relevant factors. All of the facets and factors are interrelated, and one cannot be structured without consideration of the structure of others, if fair and effective representation is to be achieved. The structuring and employment of these facets and relevant factors requiring judgmental decisions are best left to the judgment of the political body.

III. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not require that at least one house of the Hawaii Legislature be apportioned among single-member districts.

A. The District Court's holding that this is required was contrary to the holdings of this Court. *Fortson v. Dorsey*, 379 U.S. 433 (1965), expressly held that multi-member districts, without more, are not *per se* constitutionally invalid, especially if, on the face of the apportionment itself, there is substantial compliance with the equal-populations principle.

B. 1. Whether or not the State should apportion its Legislature on the single-member districting system or on the multi-member districting system rests in the judgment of the political community. After all, whether one system or the other is used depends on the body politic's philosophy of government and the role of the legislature, concept of "representative government," political realities, experience, and judgmental decisions on how best to achieve fair and effective representation for all citizens.

2. In the reapportionment of the Hawaii Senate, the Hawaii Legislature was governed by its policy determination that it would be in the best interest of the State to foster the election of legislators oriented toward the broad, state-wide problems rather than the election of legislators oriented toward narrow, local issues.

3. Moreover, in selecting multi-member districts for the Senate, the Hawaii Legislature took into consideration varied relevant factors. Factors such as the numerical size of the respective houses of the Hawaii Legislature, the population size of the Senatorial Districts, the frequency of reapportionment, trends in population shifts, and the relationship between the House and the Senate all influenced and dovetailed to fashion multi-member districts for the Senate. In the judgmental decision of the Legislature, single-member districts would have created senatorial districts too small in population size. Based on such policy determinations and judgmental decisions, it cannot be said that the multi-member districting of the Senate was invidious or lacking in rationale.

C. 1. The District boundaries of the proposed Hawaii Senate apportionment in and of themselves cannot be said to be invidious or arbitrary. Even if it is assumed that the drawing of the district boundaries resulted in some persons being discriminated against, it cannot be said that the discrimination was arbitrary. The boundaries followed geographical, historical, and natural lines, adhered to the principles of compactness and contiguity, and took into account centers of population concentration and existing communities. The result was that there was considerable amount of logic and meanir gfulness in the senatorial district boundary lines.

2. The senatorial districting caused one representative district and one senatorial district on Oahu to have identical

boundary lines, and another representative district and another senatorial district to have almost identical boundary lines. Even this result, however, was motivated by careful reasoning. Concerned that senatorial districts may be too small or too large in population size and wishing to avoid fashioning the districts in such manner that virtually all seven senatorial districts on Oahu would have the same boundary lines with the ten representative districts, the Hawaii Legislature exercised its reasonable judgment which resulted in only one senatorial district having the same boundary lines with a representative district, and that sameness in boundary lines was influenced by natural, geographical and historical considerations.

3. The District Court intimated that the senatorial districts were gerrymandered to protect the incumbent Senators. The record, however, is devoid of proof to justify such findings. Whether the single-member districting system or the multi-member districting system is used, there is no evidence that some incumbent Senators would not be advantaged.

D. The allegations of the Appellant in Case No. 318 that multi-member districts foster the overrepresentation of the larger multi-member districts, the submergence of minorities in the multi-member districts and the denigration of majority rule suffer from lack of evidence. The arguments are speculative at best.

1. Under the proposed reapportionment of the Hawaii Senate, if a voter in a multi-member district votes for four times as many Senators than a voter in a single-member district, it is because the voter in the multi-member district lives in a district where there are four times as many people as in the single-member district. As this Court stated in *Fortson v. Dorsey*, 379 U.S. 433 (1965), there is nothing invidious by this bare fact alone.

2. The fact that a multi-member senatorial district and a multi-member representative district have the same boundaries or substantially the same boundaries does not of itself cause any overrepresentation of that district. Again, the voter in that district votes for as many of the total number of Senators and Representatives as the population of that district bears to the total population of the State. On Oahu, even the smallest representative district votes for as many as six of the total number of Senators and Representatives and the largest district votes for a total of ten.

3. The record in this case is indeed barren of any evidence showing that minorities are submerged in multi-member districts. Who is in the majority and who is in the minority and what minority group is submerged are not identified, but left to speculation. Indeed, in any system of districting, whether single-member or multi-member, there will always be a minority and the potential of submergence of that minority is not any greater in a multi-member district than in a single-member district.

4. The principle of majority rule is not guaranteed by single-member districts. Majority rule is a problem in any system of districting. To simply assert that multi-member districting system denigrates majority rule without supportive evidence is to indulge in conjecture.

IV. The District Court erred in holding that the State Legislature must have legislative districts which are homogeneous in their ethnic, political, socio-economic, industrial and occupational complexion and that each such group have potentially equal representation in the State Legislature. This mandate effectively precludes the Hawaii Legislature from exercising its political judgment, in the light of the needs and interests of the State, to determine whether or

not the legislative districts should be homogeneous or heterogeneous in the populace complexion.

A. The Equal Protection Clause of the Fourteenth Amendment protects "persons," not interest groups or classes of people. Desirable though it may be to have group representation in the State Legislature, the right of groups to have such representation is not protected by the Equal Protection Clause.

B. 1. There are practical difficulties in any effort to apportion the Legislature among districts which are homogeneous in ethnic, socio-economic, political, industrial and occupational character. Which of the many varied interest groups are relevant and entitled to representation, which minorities are disadvantaged and to which interest group does a person belong are the kinds of questions raised in any effort to create homogeneous districts. There are no practical solutions to these questions.

2. Such practical difficulties are apparent in trying to apportion the Hawaii Legislature among districts homogeneous in character. Robert Schmitt, the expert called as a witness in the District Court found it extremely difficult to draw district boundary lines around homogeneous districts, even when census tract boundaries are used.

C. Homogeneous districts cannot be created and each such homogeneous groups cannot be given potentially equal representation in the State Legislature without dangerously subverting the equal-populations principle.

D. The role of groups is a problem in "representative government." The body politic is best equipped to determine policy questions relating to the role of interest groups and how best to structure the various facets of "representa-

tive government" to enable interest groups to have a real role in governmental process.

V. The District Court erred in enjoining the Hawaii Legislature from enacting any legislation, save such housekeeping legislation as necessary to keep the Legislature in session, until the Legislature enacted legislation, pursuant to the provisions of Article XV of the Hawaii Constitution, providing for the submission to the electorate, by a special election to be held not later than August 1, 1965, the question, "Shall there be a convention to propose a revision of or amendments to the constitution?" and for all acts required to implement such legislation. This drastic action prevents the Legislature from considering legislation essential for the health and welfare of the people of Hawaii and for the operation of the State and County governments. While the injunction was ostensibly aimed at the 1965 Regular Session of the Legislature, its language appears to be broad enough to apply to the oncoming 1966 Regular Session which convenes on February 16, 1966, unless the injunction is vacated. It does not appear that the injunction was justified nor was it in keeping with equitable principles.

VI. The District Court erred in other respects in fashioning remedies to bring about a valid apportionment of the Hawaii Legislature.

A. It erred in precluding the Hawaii Legislature from considering provisional reapportionment for the Legislature, pending the adoption of amendments to the Hawaii Constitution containing a federally constitutional apportionment plan for the Legislature.

B. It erred in precluding the Hawaii Legislature from proposing by legislation amendments to the Hawaii Constitution containing a permanent, acceptable apportion-

ment plan. The Hawaii Constitution provides for amendments to the Hawaii Constitution by one of two alternative routes: Constitutional convention or by Legislative proposals.

C. It erred in ordering that a constitutionally acceptable legislative apportionment plan be in effect for the 1966 general election. There is nothing in the record which suggests the necessity for such speed in fashioning a permanent apportionment plan for Hawaii to safeguard the constitutional rights of plaintiffs.

VII. The District Court correctly invalidated only that portion of Article III, Section 2, of the Hawaii Constitution relating to the apportionment of the Senate. Appellant in No. 318 contends that the District Court should have invalidated other portions of Article III, relating to the apportionment and reapportionment of the House of Representatives.

A. The District Court was not required under *Maryland Committee v. Tawes*, 377 U.S. 656 (1964) to invalidate that portion of the Hawaii Constitution relating to the apportionment of the House of Representatives merely because it had invalidated that portion relating to the apportionment of the Senate. While this Court must view the apportionment of any house of a bicameral legislature in the light of the apportionment of the other, the District Court had discretion to uphold the validity of the apportionment of the House in seeking to insure legislative apportionment which will comport with the requirements of the federal Constitution.

B. 1. The District Court correctly refused to invalidate that portion of the Hawaii Constitution relating to the numerical sizes of both houses of the Hawaii Legislature.

There is no magic in the numerical size of either house. The size of the respective houses is a question for the political body to determine. It cannot be said that the Hawaii Legislature would have created a State Senate or a State House of a different numerical size had the District Court invalidated that provision of the Hawaii Constitution.

2. The District Court was correct in not invalidating that portion of the Hawaii Constitution which "froze" the representative districts upon reapportionment, unless the number of registered voters within a district dropped to less than one-half of the quotient obtained by dividing the total number of registered voters by 51. This provision in the Constitution, together with the numerical number for the respective houses of the Legislature and the requirement of compactness and contiguity of districts all led to supplying that brake which is needed to keep partisan gerrymandering to a minimum at each decennial reapportionment.

3. The District Court was correct in refusing to invalidate that portion of the Hawaii Constitution requiring decennial reapportionment. Simply because Hawaii's decennial reapportionment happens to fall one year before the decennial United States census, does not mean that the reapportionment conducted in accordance with the Hawaii Constitution is invidious. In the first place, the decennial reapportionment falls one year prior to the decennial census because the Constitution was adopted in 1950, and the first reapportionment occurred in 1959. In the second place, since the reapportionment measure is the number of voters registered at the last preceding general election, the census count has no relevancy in the reapportionment of the House.

4. It cannot be said that the failure of the District Court to invalidate all portions of the Hawaii Constitution relat-

ing to the apportionment of both Houses of the Hawaii Legislature made the task of the State Legislature any more difficult in drafting the proposed Senate Reapportionment Plan, than it would have been had the District Court invalidated them. To argue so is to engage in conjecture. It would appear that if both houses required reapportionment, the task would have been doubly difficult.

VIII. The District Court correctly held that there is nothing invidious about measuring "population" on the number of registered voters at the last preceding general election in the apportionment of both the House and the Senate of the Hawaii Legislature.

A. The State may validly use the registered voter measure of population. The equal-populations principle is to enable each voter's vote to be given weight equal to the weight of the votes of all other voters. The Equal Protection Clause in state legislative apportionment cases protects the qualified voter; it does not guarantee "equal representation." While "equal representation" is the object of legislative apportionment, legislative apportionment alone cannot guarantee such equality.

B. 1. If total population is used as the basis for legislative apportionment, the weight of the votes of voters residing in districts with a greater number of nonvoters will tend to be more than the weight of the votes of the voters residing in districts with a lesser number of nonvoters. But, this is precisely what will happen if Hawaii uses the census total population figure in its legislative apportionment. In the census count, all military and their dependents and all tourists are counted. An effort is made to reallocate the tourists to their home state, but there is no

reliable count of how many are so reallocated. Military personnel are never reallocated to their home state although their legal and voting residences may be outside of Hawaii.

2. If total population is the measure upon which the Legislature must be apportioned, because of the large number of military and their dependents in Hawaii who are not qualified to vote, there would be districts on the island of Oahu consisting almost entirely of the military, with very few registered voters. Their votes, of course, will then weigh much more than the votes of other voters in other districts. There is indeed the distinct possibility that there may be districts in which there may be no voters at all.

C. The number of registered voters in Hawaii is in direct proportion to the number of civilians (excluding military) residing in Hawaii. This held true even when the Constitutional Convention of Hawaii was in session in 1950. Thus, even if the measure of population is the number of registered voters, the allocation of the number of seats in the Hawaii Legislature will be substantially the same as the allocation based on "total population."

D. The use of the number of registered voters in measuring "population" does not discriminate again certain segments of the State's population as Appellant in Case No. 318 contends. The figure showing the percentage of registered voters on Oahu is misleading, since it includes a large number of military concentrated on Oahu. The figures showing the percentage of the poor, illiterate and low median population age registered to vote are also misleading. With respect to the military, the qualification of those in the armed forces to participate in Hawaii's electoral process is not before this Court.

IX. The use of the multi-member districting system for the House of Representatives does not violate the Equal Protection Clause.

A. As in the case of the proposed Senate Reapportionment Plan, the use of multi-member districting system for the House of Representatives was influenced by determinations of policy and judgment decisions made by the Delegates to the Hawaii Constitutional Convention in 1950.

B. The use of multi-member districts for the House of Representatives has not been demonstrated to result in any invidious discrimination. The contentions of Appellant in Case No. 318 in these respects are purely speculative and the alleged results can occur as easily in single-member districts as in multi-member districts.

1. The representative district lines are based on established historical, geographical and natural lines, the districts adhere to the principles of compactness and contiguity, and there is proportionately equal populations in the districts. On its face, then, the districting of the House of Representatives cannot be said to be invidious or that there is lack of equal weight in the votes of all voters.

2. The alleged results of overrepresentation of the larger multi-member districts, submergence of the minority in multi-member districts and denigration of majority rule are all speculative. No proof was offered in the District Court to prove any of these allegations. Overrepresentation of certain segments of the population, submergence of minorities and denigration of majority rule can occur in single-member districts as well as in multi-member districts. The allegations of Appellant further suffer from the lack of specificity as to what majority is advantaged and what minority is submerged in the multi-member districts

ARGUMENT

The appellants in Case No. 409 contend that the District Court erred in rejecting the Senate Reapportionment Plan and in imposing its injunctive remedy. At the same time, however, the appellants believe that the District Court was correct in a number of its other holdings.

Since this brief is intended not only as the opening brief of the appellants in No. 409, but also as an answering brief to the brief filed by Appellant in Case No. 318, reference will be made from time to time to the brief of Appellant in Case No. 318. Where applicable, such references, for brevity, will be designated "GO Br." followed by pagination.

The order in which the arguments are presented is first, the errors of the District Court, and, second, the correctness of certain rulings of the District Court. In discussing the errors of the District Court, the arguments are intended, of course, not only to support the position of these appellants, but also to answer the arguments raised in the brief of Appellant in Case No. 318. The arguments upholding certain rulings of the Distrct Court are, of course, intended primarily as an answer to the brief of Appellant in Case No. 318.

I. THE DISTRICT COURT ERRED IN PLACING THE BURDEN UPON THE LEGISLATORS TO SHOW THAT THEIR SENATE REAPPORTIONMENT PLAN WAS CONSTITUTIONALLY VALID AND JUSTIFIABLE.

The District Court, by its decision and order of February 17, 1965, and again by the Memorandum of Judge Beeks to Judge Pence, placed an affirmative burden upon the Legislature to justify any creation of multi-member senatorial districts. (R. 79, 238 F. Supp. 468, 478; Appen-

dix B, pp. 20a to 21a, *infra*) The tenor of the District Court's decision and order dated April 28, 1965, is that the Legislature had the burden of showing that its senate reapportionment plan did not operate to minimize or cancel out the voting strength of any political, racial, social or economic element of the voting population, and that the plan was otherwise constitutionally valid and justifiable.

The District Court further concluded, without affirmative proof of any kind being submitted by any party, that the multi-member senatorial district plan resulted, in a material part at least, from gerrymandering. (R. 163, 240 F. Supp. 724, 732) From the finding of the court, it appears that the burden was upon the Legislature to show affirmatively that the multi-member district senatorial reapportionment plan did not result from gerrymandering.

Where a state legislature or other body politic frames a reapportionment plan, the burden is not on the framers to justify the plan; rather, the burden is upon the opponents of the plan to show that the plan minimizes or cancels out the voting strength of racial or political elements of the voting population, that the plan is the result of gerrymandering or that it is otherwise constitutionally defective and invalid. This is particularly true where, as in this case, the legislative apportionment plan complies substantially with the equal-populations principle enunciated by this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964).

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is used to test the validity of classifications, unequal treatments or discriminations. It is firmly established that not all classifications violate the Equal Protection Clause. In *Morey v.*

Doud, 354 U.S. 457, 464-65 (1957), this Court, quoting from prior cases, re-stated the rules for testing the validity of a classification:

"The rules for testing a discrimination have been summarized as follows:

" '1. The Equal Protection Clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369.'

"To these rules we add the caution that 'Discrimination of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37-38, 48 S.Ct. 423, 425, 72 L.Ed. 770; Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459, 462, 57 S.Ct. 838, 840, 81 L.Ed. 1223."

The cases which have come before this Court under the Equal Protection Clause have generally fallen into one of two categories. (1) The first group of cases have been those in which the discrimination or classification was based on race or sex, in which instance, this Court held that the classification, *whether rational or not*, was simply impermissible under the Equal Protection Clause. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). (2) The second group of cases have been those in which the unequal treatment or discrimination or classification was not on any impermissible basis, but was shown to be invidious or without rational basis by the person attacking the classification. *Allied Stores, Inc. v. Bowers*, 358 U.S. 522 (1959); *Morey v. Doud*, 354 U.S. 457 (1957).

In state legislative apportionment cases, the tests to determine whether or not any apportionment plan violates the Equal Protection Clause have been said to be "well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular fact they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. 186, 226 (1962). In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that apportionment of the seats in either house of the State legislature among legislative districts of "unequal populations" dilutes the weight of the vote of voters of larger population districts and thus violates the Equal Protection Clause. Apportionment among districts of "unequal populations" violates the Equal Protection Clause not necessarily because it is irrational or involves something other than a "republican form of government," but simply because it is "impermissible under the Equal Protection Clause." 377 U.S., at 575.

Thus, a State legislative apportionment plan which *on its face* appears to discriminate on the basis of race or sex or to apportion seats in either house of the State legislature among districts of "unequal populations" falls within the first group of cases enumerated above, and there is no presumption of validity and the rules re-stated in *Morey v. Doud*, 354 U.S. 457 (1957), do not apply.

It is submitted, however, that once it is clear, as it is in this Hawaii Legislative Apportionment Case,[2] that both houses of the State Legislature are apportioned in substantial compliance with the equal-populations principle, the general rules apply. The apportionment scheme is presumed constitutional and the burden is on the party attacking it, to show that it causes invidious discrimination or that it is the result of arbitrary or capricious action or that it contains basic inequities, no matter what factors were assumed to have been applied. *Lisco v. McNichols*, 208 F. Supp. 471, 477 (1962).[3] If any state of facts can reasonably be conceived to justify it, the existence of these state of facts will be presumed to have existed at the time it was drawn and it will not be set aside. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79; *Morey v. Doud*, 354 U.S. 457, 464-65 (1957); *McGowen v. Maryland*, 366 U.S. 420, 426 (1961).

Placing the burden on the one attacking the apportionment plan is a reasonable one. "Apportionment is one of

---

[2]The District Court noted that both the House and the proposed Senate apportionments conform to the equal-populations principle. (R. 79; R. 155)

[3]See also Israel, *Non-population Factors Relevant to an Acceptable Standard of Apportionment*, 38 NOTRE DAME LAW. 499 504, especially note 31 (1963).

those fields where it is easier to identify unfair or unequal methods than to articulate a *fair* method." [4]

Oddly enough, the District Court seemingly agreed that the burden should be on the party attacking the legislative apportionment scheme when it noted in its February decision:

> "3. The plaintiffs and intervening plaintiffs *have failed to prove* that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied." (R. 79-80, 238 F. Supp. 468) (Emphasis added.)

Yet the District Court, inconsistently it appears, required the Legislature to justify the Senate Reapportionment Plan.

In *Fortson v. Dorsey*, 379 U.S. 433 (1965), this Court, held that it could not say that the multi-member districting plan for the Georgia Senate was *per se* bad, inasmuch as there was no "mathematical disparity" in the population count between the single-member districts and the multi-member counties. This Court refused to pass on the question whether or not Georgia's reapportionment plan for the Senate "operated to minimize or cancel out the voting strength of racial or political elements of the voting population," although the appellees raised this objection in their briefs, because the point was never seriously pressed by the appellees in the court below and no proof to support the objection was offered at the district court level.

---

[4] Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 370 (1963).

Similarly, in this Hawaii case, the charge of gerrymandering, if any, and the charge that the House apportionment or the Senate reapportionment plan operated to minimize or cancel out the voting strength of political, racial, social or economic elements of the voting population should have been pressed and proof offered in support thereof by the opponents of the Hawaii House apportionment and the Hawaii Senate reapportionment plan. It will be shown in this brief that no such evidence was ~~even~~ ever submitted. On the contrary, this brief will show that if any is required, abundant evidence is in the record for the House apportionment and the proposed Senate reapportionment to pass the tests of the Equal Protection Clause.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN JUDICIALLY ATTEMPTING TO STRUCTURE THE VARIOUS FACTORS INVOLVED IN THE DEVELOPMENT OF FAIR AND EFFECTIVE REPRESENTATION FOR EACH VOTER IN THE HAWAII LEGISLATURE.

The Senate Reapportionment Plan presented to the District Court on April 14, 1965, created eight senatorial districts with substantially equal population per senator. The District Court conceded that "the number of registered voters per senatorial district and apportioned to the four basic areas . . . conforms to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus meets that one test of constitutionality." (R. 155; 240 F. Supp., at 727.) The District Court, nevertheless, held the reapportionment plan unconstitutional. It held that the following features made the plan unacceptable: (1) the plan contained multi-member districts; (2) the respective senatorial districts were "highly" heterogeneous in their ethnic, socio-economic, industrial and occupational complexion; (3) the boundaries of some senatorial districts were identical to or co-

incided to a great degree with the boundaries of certain representative districts. The District Court sought judicially to structure these factors and to curtail the exercise of political judgment by establishing rigid standards that the senatorial districts *must* be based on single-member districts, that the senatorial districts *must* be homogeneous in their ethnic, political, socio-economic, occupational and industrial complexion and each such homogeneous district *must* have potentially equal representation in the Hawaii Legislature, and that *no* senatorial district boundaries may be identical to or coincide with the boundaries of any representative district.

Each of the District Court's objections is discussed at length in the subsequent portions of this brief. This part of the brief is intended merely to point out that legislative apportionment presents many complex problems, the determination of which involves to a high degree, the formulation of public policies and the exercise of judgment. Public policy decisions and judgment determinations will chart the course of apportionment. Within the constitutional limitations proscribing certain bases of discrimination, there is room for the body politic to make these policy decisions and judgment determinations.

A. The legislature is but one facet of government which requires proper structuring in achieving fair and effective representation for all citizens and the structuring of each facet to achieve this basic aim depends on the structure of many relevant factors.

As stated by this Court,

> "[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

This Court held in the *Reynolds* case that to achieve this aim, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires that the weight of the vote of a citizen be substantially equal to the weight of the vote of every other citizen, and that to insure this "weight-equality," both houses of a bicameral state legislature must be apportioned on a population basis—that is, the state legislature must be so apportioned that the legislative districts in both houses are "as nearly of equal population as is practicable." 377 U.S. 533, at 577.

The Legislature, however, is but one of many facets of government. Proper apportionment of the legislature alone does not insure fair and equal representation. Professor Robert G. Dixon, Jr., makes these comments:[5]

> "In short, a one man-one vote principle guarantees change; taken alone, it may not always guarantee fair representation, which should be the ultimate goal."[6]

> "Judicial creation of equal population districts, without more, cannot be counted on to produce either 'equally weighted' votes or 'equally effective' votes."[7]

In addition to proper legislative apportionment, the achieving of fair and effective representative government depends on the shape of the other two branches of government, voter registration and election procedures, legislative and administrative procedures, pressure groups and political parties. These facets are all inter-related; none

---

[5]Dixon, *Reapportionment in the Supreme Court and Congress*, 63 MICH. L. REV. 209 (1964).

[6]*Id.* at 217.

[7]*Id.* at 219.

of them can be considered in isolation. How each is structured influences the structuring of the others, and each must be properly structured in relation to the others to achieve a fair and effective representative system.

Not only are the facets of government inter-related, but the shaping of each is influenced by the political community's theory of representative government, political and social philosophies and political, social and economic experience and development. In addition, the structuring of each facet and its component parts is often dictated by the existing state of facts or factors.

Legislative apportionment is the division of the populace into constituencies whose electors vote for members of an assembly.[8] How the districts should be aligned and how many of the legislators should be apportioned among the various districts entail consideration of existing geography, political subdivisions, nature of the electorate, frequency of apportionment, dispersion of various interest groups throughout the state, and the size and kind of legislature.

The lesson taught by *Reynolds v. Sims*, 377 U.S. 533 (1964), and its companion cases on state legislative apportionment, is that regardless of how the various facets of democratic government are structured and regardless of the facts considered by the body politic, to insure equal weight to the votes of all citizens, the state legislature must be apportioned among districts composed of substantially equal numbers of people. This Court did not prohibit the body politic from considering the effect of the existing structure of the various facets of government or from approaching the problem of apportionment in the light of the varient

---

[8] De Grazia, Apportionment and Representative Government 18-19 (1963).

factors. This Court has been made aware of the complexity of legislative apportionment, *Reynolds v. Sims*, 377 U.S. 533, 566 (1964), and has recognized that the constitutionality of a state legislative apportionment plan may well depend on the circumstances of the state. Thus, this Court stated,

> "Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting . . . What is marginally permissible in one State may be unsatisfactory in another depending on the particular circumstances of the case." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

This Court has often recognized history and geography as factors to be considered in drawing district boundary lines. It has recognized too, that integrity of political subdivisions is a factor. This Court indicated that there may be, on a rational basis, some deviation from the equal-populations principle, provided, that the "overriding objective [is] . . . substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

B. The structuring and employment of the various factors in legislative apportionment require to a great degree the exercise of judgment better accomplished by the body politic rather than the judiciary.

Since *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, this Court has consistently refused to define what constitutes a "Republican Form of Government" within the meaning of the Guaranty Clause of Article IV, section 4 of the Constitution of the United States. While it may appear that this Court's enunciation of the equal-populations principle has

a direct bearing on the form of "representative government" a state may enjoy, this Court, in deciding *Reynolds v. Sims*, 377 U.S. 533 (1964), and the companion state legislative apportionment cases, decided no more than that the Fourteenth Amendment makes it impermissible for a state to discriminate against a person, by reason of his homesite, in the weight to be accorded to his vote. *Baker v. Carr*, 369 U.S. 186, 218-226 (1962). Within the constitutional limits prohibiting discrimination of a voter in the weight of his vote by reason of homesite, the body politic is better equipped to make the judgment decisions in the light of the varient factors and their structures and to make the policy decisions necessary in achieving fair and equal representation for all citizens in the state legislature.

That there is room for judgmental and policy decisions by the body politic is implicit in the holdings of this Court, thus:

> "States can within limits specify the qualifications of voters in both state and federal elections; . . .
>
> ". . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." *Gray v. Sanders*, 372 U.S. 368, 379 (1963).
>
> "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 581, n. 63 (1964).

As indicated earlier, voter qualifications and the size of the state legislature are indeed factors influencing the shape of the state's legislative body.

Thus, as it will be more fully developed in the subsequent portions of this brief, whether the reapportionment plan for the Hawaii Legislature should be based on multi-member districts or on single-member districts, whether the senatorial districts should be homogeneous or heterogeneous in their ethnic, political, socio-economic, industrial and occupational complexion, and where the district boundary lines should be drawn were questions better left to the judgment and policy determinations of the Hawaii body politic, especially in the light of substantial adherence by the Hawaii Legislature to the equal-populations principle.

III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THAT ONE HOUSE, AT LEAST, OF HAWAII'S BICAMERAL LEGISLATURE BE APPORTIONED ON THE BASIS OF SINGLE-MEMBER DISTRICTS.

A. The Equal Protection Clause does not per se require that one house at least of a State bicameral legislature be apportioned among single-member districts.

Pointing to its February decision (R. 62-81, 238 F. Supp. 468) the District Court held that since the Hawaii House of Representatives was apportioned on a multi-member districting system, the Senate reapportionment plan must provide for single-member senatorial districts, unless valid and compelling justifications could be shown for the creation of multi-member districts. For authority, it cited *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556 (1964).

The appellant in Case No. 318 goes further than the District Court and not only contends that the House of Representatives, as well as the Senate, of the Hawaii Legislature

must be apportioned on single-member districting system, but boldly asserts that perhaps in *all* cases where both houses of any state legislature are apportioned on multi-member districting system, the apportionment is unconstitutional *per se.* (GO Br. 101-02) The argument of appellant in Case No. 318 leaves no room for single-member districts in any plan of apportionment in either house of a bicameral legislature—apparently, regardless of the justifications which a court might consider in upholding multi-member districts.

In *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556 (1964), the court did not rule that at least one house of the Pennsylvania Legislature must be apportioned on the basis of single-member districts, nor did it require, as a matter of law, justifications for the creation of multi-member districts. The court in that case acknowledged that the creation of multi-member districts would not of itself violate the Federal Constitution merely because the voters of one district may vote for two or more representatives while the voters of another district may vote for a lesser number. The court simply recognized the difficulties which may be encountered in setting up multi-member districts, and cautioned that it might be *more prudent* to approach the matter of apportionment by setting up single-member districts. 203 A.2d, at 572-73.

None of the cases decided by this Court has ever *required* that at least one house (much less, both houses) of a bicameral State Legislature be apportioned on the basis of single-member districts nor has it required *justifications* for the creation of multi-member districts. This Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), stated:

"Single-member districts may be the rule in one State, while another State might desire to achieve some flexi-

bility by creating multi-member or floterial districts." 377 U.S., 579

In *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964) this Court discussed some of the practical problems in that system of election where a number of senators and representatives are elected on an at-large basis in a district. This Court, however, made it clear in note 21, 377 U.S., at 731, that it was not intimating that an at-large election of a number of legislators from a county or any political subdivision, was constitutionally defective.

Then, in *Fortson v. Dorsey*, 379, U.S. 433 (1965), this Court rejected the argument that the multi-member districting system for the Senate of the Georgia Legislature was constitutionally defective. It stated:

> "Only last Term, in our opinion in Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506, decided after the decision below, we rejected the notion that equal protection necessarily requires the formation of single-member districts." 379 U.S., at 436.

While it is true that in *Fortson v. Dorsey*, this Court had before it the multi-member districting system of only the Senate of the Georgia Legislature, this Court did not expressly limit its holding to only one house of a bicameral legislature. In *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964), this Court's observation respecting at-large elections of several legislators from a county or a political subdivision was directed to the existing Colorado's scheme of apportionment which required at-large elections of a number of legislators of both houses from a county.

Thus, the apportionment of both houses of the Hawaii Legislature on multi-member districting system does not

per se violate the Equal Protection Clause of the Fourteenth Amendment. The remainder of this part of the brief is focused on the question whether *on the basis of the facts of this case*, the multi-member districting system in the Hawaii Senate Reapportionment Plan dilutes the weight of a voter or otherwise discriminates against a voter in violation of the Equal Protection Clause.[9] If, as the District Court held, justifications are needed for the creation of multi-member districts for the Hawaii Senate, the following discussions will more than amply provide such justifications.

B. Multi-member districts in the Senate Reapportionment Plan were fashioned upon policy considerations and relevant factors and thus cannot be said to be arbitrary, irrational or as reflecting no policy.

The choice of using single-member districts or multi-member districts in the apportionment of the State Legislature is influenced by judgmental decisions arising from the consideration of numerous factors and policy determinations based on the needs of the community in the light of its political, social and economic experience and development. The Hawaii Legislature, in fashioning the Senate Reapportionment Plan on multi-member districts, made these judgmental decisions and policy determinations. It was influenced by the relative needs of the State and the structure of existing factors in arriving at its decision to create multi-member senatorial districts.

1. *The selection of single-member or multi-member districting system is rooted in public policy considerations.*

---

[9]While the ensuing discussion is covered primarily in terms of the proposed Hawaii Senate Reapportionment Plan, it is equally applicable to the present apportionment of the Hawaii House of Representatives. (See pp. 109 to 116, *infra*.)

Multi-member districts are just as much in the American tradition as single-member districts. For nearly two centuries the various States experimented with both the single-member districts and the multi-member districts.[10] This issue of single-member districts versus multi-member districts has been debated for years in the various states. Oddly enough, the arguments posed by the proponents of single-member districts and the proponents of multi-member districts stem from the same premises. These premises are cited by both sides to support or justify their respective positions. Thus, they both state:

a. There is less diversity of interests within single-member districts, and more diversity of interests within multi-member districts.

b. Elections in single-member districts concentrate on the candidates; elections in multi-member districts concentrate on the broad issues rather than on candidates.

c. As a matter of survival at the polls, the legislator chosen from a single-member district is apt to be more responsive to his constituents and to pay closer attention to local needs; the legislator chosen from multi-member district is oriented toward state-wide problems rather than purely local issues.

d. Since a legislator chosen from a single-member district is more responsive to his constituents, he is less

---

[10]Silva, *Compared Values of the Single and the Multi-Member Legislative District,* 17 THE WESTERN POLITICAL QUARTERLY 504 (1964). In this treatise, Professor Silva traces the evolution of the single-member districting system in the United States and discusses the arguments traditionally advanced by the proponents of the single-member districts and the proponents of the multi-member districts.

dependent on his political party; a legislator chosen from a multi-member district fosters the development of responsible political parties.

e. Legislators from single-member districts, with less party pressure upon him will be more amenable to the needs of various interest groups; legislators from multi-member districts will be more responsible to his political party and less amenable to pressure groups.

While the truth of these basic premises has never really been established, (mainly due to the lack of statistical studies)[11] the fact that both the proponents of the single-member districts and the proponents of the multi-member districts thus agree reduces the basic premises to these questions of policy, the determination of which will influence whether the single-member districting system or the multi-member districting system is to be used within a state. (1) Should the election of state legislators be centered on issues rather than candidates and personalities? (2) Should the legislators be local-issue oriented, or state-wide issue oriented? (3) Should development of political parties and political party responsibility be fostered? (4) Should legislators be subservient to pressure groups or should they be insulated as much as possible from the pressures of interest groups? The answers to these questions of policy depend on the political philosophy, experience and development of the political community. And, these are precisely the questions to which the Hawaii Legislature addressed itself in fashioning multi-member districts for the Hawaii Senate.

---

[11]Silva, *Compared Values of the Single and the Multi-Member Legislative District*, 17 THE WESTERN POLITICAL QUARTERLY 504, 508, 509 (1964)

Of course, the proponents of the single-member districting system and the proponents of the multi-member districting system disagree on exactly what effect either system has on the concept of "representative government". Thus, as the Appellant in Case No. 318 contends, the proponents of the single-member districting system claim that multi-member districting system overrepresents the large multi-member districts, submerges the rights of minorities, facilitates gerrymandering and denigrates the principle of majority rule. Each of the Appellant's contentions is dealt with in the subsequent portions of this brief. Suffice it here to point out that these contentions are speculative at best, and in the Hawaii apportionment case, for both the House and the Senate, the contentions are without factual foundation.

2. *Multi-member districting system for the Hawaii Senate was based on policy considerations.*

The District Court noted in its April decision that the Legislature, in creating multi-member senatorial districts under the Senate reapportionment plan, failed to consider or use any other criteria, "save number of registered voters, geographical boundaries and historial representative district lines." (R. 156, 240 F.Supp., at 727-28) This charge is repeated in the brief of Appellant in Case No. 318. Contrary to this finding, the Conference Committee reports attached to the plan submitted to the District Court (R. 119, 130) and the testimony of Senator Sakae Takahashi (R. 293-316) reveal that the Hawaii Legislature chose multi-member senatorial districts after wrestling with serious policy questions.

One of these questions was whether or not the make-up of the Hawaii Senate should reflect concern for state-wide problems rather than local problems. Although cognizant of the argument that "small, single-member districts may

offer an advantage by providing a close relationship between voter and legislator and that it may provide a chance for the voters to become better informed, based on this close relationship," (R. 123, 134) the Legislature, in the light of the rapid, economic development of the State as a whole, concluded that the best interests of Hawaii would be served by a legislature oriented toward statewide problems rather than purely local issues. (R. 297-98) The reports of the Conference Committee of the Legislature contained these observations: (1) single-member districts would tend to cause senators to be concerned primarily with localized issues and ignore the broader issues facing the State, thus fragmenting the approach to state-wide problems and programs, including economic development and capital improvements programs, to the detriment of the State as a whole (R. 123, 134); (2) multi-member districts will provide a better opportunity for increasing the significance of an individual's vote by focusing the individual's attention on a broad spectrum of major community problems as opposed to those of more limited and local concerns (R. 124, 135).

As the District Court pointed out in its February decision, the government of Hawaii is strongly centralized. (R. 64, 238 F. Supp., at 470-71) The State has complete control over the judiciary, taxation, education, and public health and welfare, among other areas of government concern. This highly State-centered form of government and Hawaii's developing and expanding economy, the dispersion of voters into new suburban communities, the growing demand for the fulfillment of social needs of the people give substantial merit to the policy decision of the Hawaii Legislature. Single-member senatorial districting system, with each senatorial district having a voter population of ap-

proximately 9,500[12] would tend to foster the growth of small community political machines and the election of legislators with narrow, local viewpoint, when the social, economic and political demands of the people of Hawaii are largely of state-wide concern.

The Legislature in creating multi-member districts for the Hawaii Senate was concerned, too, with the development of a strong two-party system for the State. Thus, even in rejecting single-member senatorial districts, the Legislature expressed concern that if the districts were made too large, Hawaii's two party system would be weakened. (R. 124, 135) The concern of the Legislature for a strong two party system was indeed in keeping with its policy decision to foster the election of legislators with broad, state-wide perspective. A strong party system demands the loyalty of the legislator to his party's stand on major issues facing the State, rather than to the demands of different interests which harbor narrow perspectives.

Indeed, by the very nature of the political process, determination of such public policy is better accomplished by the Legislature than the judiciary. The choice between single-member districts and multi-member districts for the Hawaii Senate was properly dictated by legislative determination of such policy. Thus, the Legislature's election to pursue multi-member districting system for the Hawaii Senate cannot be said to be unreasonable, arbitrary or that it reflects no policy.

3. *The selection of multi-member districts for the Hawaii Senate was influenced by the shape of other existing factors.*

---

[12]Based on the 1964 registered voters count. (R 55)

In addition to the policy determination that it is in the best interests of the State to foster the election of legislators who are oriented toward state-wide problems rather than toward local issues, the structure of the following factors influenced greatly the decision of the Legislature to create multi-member districts for the Senate: (a) numerical size of the legislature; (b) size of the senatorial districts; (c) frequency of reapportionment; (d) population shifts; (e) relationship between representative districts and senatorial districts.

The Hawaii Constitution provides for a 25-member Senate and a 51-member House. In drawing the Senate Reapportionment Plan, one of the grave concerns of the Legislature was the creation of districts containing population too small or too large in number. (R 123-25, 134-36) The creation of single-member districts for the Senate would mean that each senatorial district would have a registered voter population of approximately 9,500, based on the 1964 registered voter enumeration. (R. 55) It would mean, further, that the island of Oahu, which has the bulk of the State's population would be divided into 19 senatorial districts. Single-member senatorial districts containing 9,500 registered voter population would be too small—too small for a number of reasons.

(a) Single-member senatorial districts would subvert the legislative policy of fostering the election of legislators with broad view (R. 123, 134, 297).

(b) Small, single-member districts would compound the technical and intricate problem of drawing the boundaries of the districts, and could lead to indiscriminate districting without regard for political subdivision, or geographic, natural or historical boundary lines, which this Court noted

in *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964), "may be little more than an open invitation to partisan gerrymandering." (R. 124, 135)

(c) Small, single-member districts would be highly susceptible to the vicissitudes of population shifts. The Conference Committee of the Hawaii Legislature in its reports observed:

> "This means that if small, single-member districts are employed, more frequent reapportionments and readjustments of district boundaries would be required. This concern is particularly significant on Oahu which has experienced a population boom and the massive and rapid development of residential subdivisions to accommodate the increased and mobile population." (R. 125, 135)

To Robert Schmitt, an expert witness, the proposed districting of the senate provided the optimum to prevent disparity in population among the various senatorial districts during a ten-year apportionment period. (R. 328) In his judgment, single-member districts, particularly on Oahu, would be seriously affected by fluctuations in population during the ten-year period. He noted that the population of some of the single member senatorial districts would decline as much as 33.6 per cent and others would increase as much as 141.7 per cent. On the other hand, the proposed senatorial multi-member districts would have a population change of only 4 per cent. (R. 320) He said,

> "The same thing is true in the trend of registered voters. It has a small area with a large number of small districts which would be subject to considerable fluctuation in a short period of time in the number of registered voters; whereas a small number of large districts or pockets, pocket districts, would be subject to much less

fluctuation in the number of registered voters, that is, proportionately. This is over a period of a decade, a large number of small districts would tend to move in very divergent directions; whereas in a few large districts, areas of growth within any district would tend to balance out areas, and vice versa." (R. 318)

(d) Traditionally senatorial districts have been larger than representative districts. To compensate for the extra territory which must be covered by a senatorial candidate at elections and represented by a successful candidate, the term of office for the Senate was set at four years and for the House of Representatives at two. (R. 123, 134) Single-member senatorial districts would mean that in many instances, particularly on the island of Oahu where the State's population is concentrated, senatorial districts would be smaller than representative districts. This would subvert not only tradition, but the intent of the framers of the Hawaii Constitution. (R. 123-24, 134-35) At the time of the drafting of the Senate Reapportionment Plan, the Legislature was aware of the District Court's February decision (R. 62-81, 238 F. Supp. 468) that the make-up of the Hawaii House of Representatives, with its multi-member districts, was constitutionally valid.[13] While the February decision of the District Court by itself is not controlling in determining the validity of the Senate Reapportionment Plan, that decision, taken in conjunction with the policy questions faced by the Hawaii Legislature and the other factors enumerated above, provided a reasonable basis and valid justification for the creation of multi-member senatorial districts.

---

[13]It is the position of the appellants in No. 409 that the House of Representatives is constitutionally apportioned (see pp. 85 to 89, *infra*) and that the multi-member districting system of the House of Representatives is constitutionally acceptable (see pp. 109 to 116, *infra*).

While the Hawaii Legislature wished to avoid creating senatorial districts containing voter populations too small in number, it equally wished to avoid creating senatorial districts containing voter populations too large in number. In its reports, the Conference Committee noted that "if the multi-member district has too large a number of senators or too large a number of vacancies to be filled in the same election, then intelligent voter selection may become quite difficult and the two party system may be weakened." (R. 124, 135)

Having rejected single-member districts, and wishing equally to avoid creating districts containing voter populations too large in number, the Hawaii Legislature gave serious thought to two-member and three-member districts for the island of Oahu. Two-member districts were still too small in the judgment of the Legislature. Three-member districts meant the division of the island of Oahu into seven senatorial districts, with many of the seven districts approaching closely the population and geographical sizes of the ten existing representative districts, leading to the dissipation of one of the real basis for bicameralism in Hawaii. (R. 127-28, 138) Five-member districts, on the other hand, would create for the island of Oahu, districts too large in size. (R. 298-99)

Upon consideration of all of the foregoing factors, the Hawaii Legislature concluded that the Senate Reapportionment Plan should provide for multi-member districts, ranging from one senator per district to four senators per district. The creation of multi-member senatorial districts upon such careful consideration of the varient factors cannot be said, by itself, to be arbitrary or lacking in rational policy.

The Appellant in Case No. 318 contends that one of the ills of the Senate Reapportionment Plan is traceable to the membership figure of 25 set by the Hawaii Constitution for the Hawaii Senate and to the assumption by the Hawaii Legislature that the Senate must be apportioned on the basis of this membership figure. He suggests that the Legislature ought to have considered reducing the number of Senators to something less than 25 in order that the Senate may be apportioned on the basis of single-member districts without making senatorial districts smaller than representative districts. (GO Br. 36-37, 39-40, 98) Appellant suggests no figure. The Proceedings of the Hawaii Constitutional Convention reflect that much thought went into the selection of a 25-member Senate and a 51-member House. The Senate membership of 15 and the House membership of 25 which existed for the Hawaii Territorial Legislature were, to the members of the Constitutional Convention, too small in the light of the increase in population since the adoption of the Organic Act and the desirability for wider representation of the population. (R. 343, 346, 348) The District Court found that there was "no built-in magic or invidiousness in the use of such numbers [25 for the Senate and 51 for the House]," and rejected the claim of plaintiffs that the number of legislators in each house was a part of some invidious scheme. (R. 66, note 4; 238 F. Supp., at 472, note 4)

The size of the legislature is a problem for judgmental decision, properly left to the political body of government. This Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), said as much:

> "Determing the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indi-

cating that there are any federal constitutional maximums or minimums on the size of state legislative bodies." 377 U.S., at 581, note 63.

The Hawaii Legislature accepted the 25-member composition of the Senate as its starting point. This acceptance was in itself a judgmental decision. Starting with this structure of the Senate numerical composition, the Hawaii Legislature proceeded to consider policy and other state of facts as indicated above.

The Appellant in Case No. 318 contends further that another of the ills of the Senate Reapportionment Plan stemmed from the assumption by the Legislature that the multi-member districting system for the House was constitutionally valid and from the notion that senatorial districts were traditionally larger than representative districts. Appellant attempted to show in his brief that the multi-member districting system in the House was unconstitutional, despite the District Court's findings of its constitutionality (R. 79-80; 238 F. Supp., at 478-79). He concluded that because the Senate reapportionment depended so much on the invalid House make-up, the Senate Reapportionment Plan was itself invalid. Short answers to this are (1) that the District Court was correct in holding that the multi-member districting of the House was constitutionally valid (See pp. 109 to 116, *infra*), and (2) although in some instances invalidity of one house may invalidate the other in a bicameral legislature, this was not the case in the Hawaii Legislative apportionment. (See pp. 85 to 89, *infra*).

C. The Proposed Senatorial District Boundaries are not arbitrarily drawn, nor are they without rational basis.

Appellant in Case No. 318 contends in his brief that the boundary lines of both the representative districts and the

senatorial districts are drawn arbitrarily, with no rhyme or reason, and thus the multi-member districting systems of both houses of the Hawaii Legislature violate the Equal Protection Clause of the Fourteenth Amendment. (GO Br. 73-76, 99). The difficulty in following this line of reasoning is that in the first place, the validity of multi-member districting system does not depend on the arbitrariness or logic of legislative district boundary lines. The validity of multi-member districts depends simply on the answer to the question whether or not there has been any substantial dilution in the weight of the vote of a voter.

In the second place, the fact that legislative district boundary lines are arbitrary does not of itself violate the Equal Protection Clause.[14] It is well to remember that the Equal Protection Clause does not guarantee equal treatment for all; it precludes the unequal treatment or discrimination or differences in classification" which lacks rational basis or which rests on grounds "wholly irrelevant to the achievement of the State's objective." *McGowen v. Maryland*, 366 U.S. 420, 425-26 (1961); *Morey v. Doud*, 354 U.S. 457, 463-64 (1957).

As noted earlier (pp. 23 to 24, *supra*), under the Equal Protection Clause, the apportionment of a state legislature

---

[14]In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court commenting on the Alabama's existing apportionment provisions stated, "Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." 377 U.S., at 568. But this dictum of the Court was clearly applicable in the case of Alabama, where the existing provisions and the proposed apportionment plan both deviated grossly from the equal-populations principle. Such is not the case with respect to the Hawaii Legislature and the proposed Senate Reapportionment Plan.

based on race or sex or which *on its face* shows disparity in population among the legislative district is simply impermissible, *whether rational or not.*

In this Hawaii Legislative apportionment case, the starting point is that neither the proposed reapportionment of the Senate nor the apportionment of the House of Representatives is on any constitutionally impermissible basis. There is no discrimination alleged on account of race or sex. Both the house districts and the proposed senatorial districts comply substantially with the equal-populations principle. Thus, this case is not one of those which are, whether rational or not, simply impermissible. Therefore, to be violative of the Equal Protection Clause, it must be shown that the apportionment contains discrimination which is invidious or without rational basis. The questions then are: (1) Are the voters in one district treated differently from the voters in the other districts? (2) If so, what evidence is there to show that the unequal treatment is without rational basis?

Appellant in Case No. 318 admits that there is equality of voting strength in the sense of the number of registered voters per legislator, but complains that there "clearly is no equality of representation." (GO Br. 79) Aside from failing to define what is "equal representation" (which was shown earlier to be a complex question requiring consideration of political theories and varient factors), the Apellant in Case No. 318 is apparently complaining of the results which he believes will stem from the multi-member districting system—*i.e.*, over-representation of the large multi-member districts, submergence of minority interests, and denigration of the principle of majority rule. It will be shown in a latter part of this brief, that this belief is

without supporting evidence, that it is speculative at best and that it can easily result even in the single-member districting system.

1. *Even if it be assumed that there is some unequal treatment of voters of some districts, it cannot be said that the proposed senatorial districts were aligned arbitrarily or without rationality. The proposed senatorial district boundaries follow closely geographic, historical and natural lines and adhere to the principles of compactness and contiguity.*

There is nothing in the District Court's April decision (R. 62-81, 238 F. Supp. 468) which even remotely suggests that the senatorial district boundary lines are in and of themselves arbitrary. Rather, the District Court found that the senatorial district boundaries follow natural, geographical boundaries and historical and statistical lines (R. 156, 157), and that the districts are compact and contiguous (R. 161). The District Court was concerned not with the geographic placement of the boundary lines, but with what became encompassed within the districts. Thus, the District Court's April opinion deals primarily with the size of the districts and the various characteristics of the populace within the districts and expresses concern over the lack of homogeneity within the districts of ethnic, social, political, industrial, economic, occupational, and community groups and interests. (R. 156, 161, 240 F. Supp., at 728)

The Hawaii Legislature's placement of the senatorial district lines was influenced by a number of factors, and the lines followed a consistent pattern. From the outset, the Legislature was gravely aware of the admonition of this Court set forth in *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964): "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines may be little more than an open invitation to partisan

gerrymandering." (R. 124, 135) In setting senatorial district lines, the Legislature followed existing geopraphical lines and density of population (R. 125, 136); "relied very heavily" on the standards of compactness and contiguity (R. 125, 136); and took into account areas of population concentration and established and recognized communities (R. 127, 137). In the words of the expert, Robert Schmitt, "On the basis of substantial equality of the number of registered voters, on the use of long standing statistical and taxation and land division boundaries, on contiguity and compactness, the districts seemed to be well thought out." (R. 317) Robert Schmitt was visibly impressed with the selection of long standing statistical boundary lines:

> "I was very impressed as a statistician to see many of the boundaries chosen by the Conference Committee are of a long-standing statistical boundaries. Now, statistical boundaries are not in themselves as meaningful as economic boundaries. But it so happens that in Hawaii, where we have excellent statistical boundaries that have endured for many years—for example, the windward side consisting of Koolauloa and Koolaupoko judicial districts has formed a unit since earliest antiquity." (R. 321)

It is true, that some of the senatorial district boundaries followed taxation district lines, while others followed geographical lines, and still others political boundary lines (counties). Yet, the end result of the drawing of senatorial district lines was that there was considerable amount of "logic and meaningfulness." (R. 325) In the light of the foregoing, can it be said that the lines are arbitrary and without rationality? Is it really required, as the Appellant in Case No. 318 contends, that the Legislature follow only

one pattern of lines, *i.e.*, census tract lines, to the exclusion of all other natural, historical, political subdivision, and statistical line?[15]

This Court has repeatedly recognized that history and geography are factors to be considered in drawing district boundaries. It held that integrity of political subdivisions is a factor and that there may be, on a rational basis, *some* deviation from the equal-populations principle. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). The following of established historical, natural, political subdivision and statistical lines, the compactness and contiguity of the districts, and the respect for existing communities all attest to the reasonableness and rationality of the senatorial district lines.

2. *The fact that one proposed senatorial district and a representative district have the same geographical boundaries and that another proposed senatorial district and a representative district have nearly identical boundaries does not render the senate districting plan arbitrary or irrational.*

As districted, on the island of Oahu, the proposed Third Senatorial District and the Eight Representative Dstrict have the same boundary lines. In addition, the proposed Sixth Senatorial District boundary lines are almost, but not quite, the same as the Fifteenth Representative District boundary lines. With respect to the proposed Third Senatorial District and the Eighth Representative District, the Koolau Range provides a natural and histori-

---

[15]See brief of Appellant in Case No. 318, page 74. The decision not to follow census tract line stemmed from the decision of the Delegates to the Hawaii Constitutional Convention to use "registered voters" as the measure of population in apportioning the House of Representatives. (R. 347-48) (See discussion of "registered voters" as the proper measure of population on pp. 95 to 109, *infra*.)

cal and a well-defined geographic and political line (R. 126, 321). Further, the alignment of the Third Senatorial District along the boundaries of the Eighth Representative District resulted only after careful consideration of relevant factors. In its deliberation in the districting of the island of Oahu, the Legislature found that one or two-member senatorial districts were too small, for the reasons already noted. (See pp. 40 to 44, *supra*.) Three-member districts would have made the boundaries of nearly all of the resulting seven Oahu senatorial districts the same as the boundaries of the ten existing Oahu representative districts. Five-member districts, on the other hand, would have meant districts too large in size. Thus, the Legislature concluded that a maximum of four members to a district would be in the best interest of the State. This meant that only one senatorial district would have the same boundaries as a representative district—the Third Senatorial District with the Eighth Representative District. (R. 299)

With respect to the Sixth Senatorial District, the break-up of the Fourteenth Representative District into two parts, one part joining the proposed Fifth Senatorial District, and the other part uniting with the proposed Sixth Senatorial District was based on natural, geographic division resulting in substantially equal population between the proposed Fifth and the proposed Sixth Senatorial Districts. (R. 301-02) Further, the division line neatly separates the Kakaako from the central business district and provides a clear distinction between areas of different social, housing, and economic characteristics. (R. 323) Can it honestly be said then that there is lacking rationale in the districting of the senatorial districts on the island of Oahu simply because one proposed senatorial district has the same boundaries as a representative district, and another proposed senatorial

district has almost the identical boundaries with another representative district?

3. *The District Court's intimation that the drawing of the senatorial district lines was accomplished in part by gerrymandering is without substance.*

The District Court pointed to the fact that a number of incumbent senators reside within short distance of each other within the proposed Sixth Senatorial District. (R. 163, 240 F. Supp., at 731) It implied that the district was made large enough to accommodate the incumbent senators, and that had the Legislature apportioned the Senate among single-member districts, these incumbents would have been pitted against each other. It is submitted that the District Court's conclusion is purely conjecture. There is no evidence to indicate where the district lines would have been drawn had the Legislature apportioned the Senate among single-member districts. It may well be that a number of the incumbents would have been equally "safe" under a single-member districting system.

The policy questions and factors considered by the Legislature were real enough. That the proposed five Oahu senatorial districts have almost equal numbers of registered voters evidences the good faith of the Legislators. The number of registered voters per senatorial district on the island of Oahu range from 27,073 (with three senators) to 40,628 (with four senators). Each of the proposed four, four-member Oahu senatorial districts has an average of 38,276 registered voters.

The District Court also pointed to the consolidation of the present two senatorial districts on the island of Hawaii into one as evidence of gerrymandering. Yet, it was shown that the present two senatorial districts were combined into one in a large part "to equalize the registered voter popula-

tion of that island with the districts on Oahu to the extent possible." (R. 127, 137-38) No such action could be taken with the less populated islands of Maui and Kauai, because those islands, under the present system, constitute one senatorial district each, and are, by their very nature, basic areas. (R. 127, 137-38) This reasoning of the Legislature is supported by the expert, Robert Schmitt. The natural, historical, geographical, and other considerations would divide the island of Hawaii into the present division of the island, if single-member districting system were to be used. The two areas are divided by lava flows and mountains. (R. 308) Yet, the population disparity between the eastern part of the island and the western part of the island (presently designated first and second senatorial districts, respectively) would cause the western part of the island to be the most overrepresented district in the State. (R. 324) Further, since 1950, the first district has been losing population, and the second district has been picking up population; thus, within the 10 year apportionment period, there would likely be a great population shift, with the result that at the end of the decennial period, there would be a representational disparity and inequity between the two districts. (R. 324, 331-32)

D. There is no evidence that Hawaii's multi-member districting system overrepresents the larger multi-member districts or submerges the minority in the multi-member districts or denigrates majority rule.

Much of the discussion set forth in that portion of this brief relating to the District Court's mandate for homogeneous districts is applicable here. The discussion here is confined to answering the complaints raised by Appellant in Case No. 318. Appellant in Case No. 318 contends that the multi-member districting system of the Hawaii House of Representatives and the Hawaii Senate Reapportion-

ment Plan should be ruled unconstitutional because, he claims, multi-member districting system tends to overrepresent the larger districts, submerge the minority, and denigrate majority rule. The arguments of the Appellant are directed to the alleged results of multi-member districting system. The record in the District Court is devoid of proof to sustain the allegations, and the arguments are the same ones usually advanced by all opponents of the multi-member districting system. They are speculative at best.

1. *There is no evidence showing that the Senate multi-member districting system overrepresents the larger multi-member districts.*

Appellant in Case No. 318 contends that citizens of a single-member district have only one legislator to look to, whereas the citizens, say of a four-member district, have four legislators to look to. Thus, he argues, a person in a four-member district has representational advantage over another in a single-member district. A short answer to this is that the four-member district has a population four times as large as the population of the single-member district, and thus, the voters in a four-member district may vote for four legislators. Without more, it cannot be said that the weight of the vote of a voter in the four-member district is not the exact equivalent of the weight of the vote of a voter in a single-member district.*Fortson v. Dorsey*, 379 U.S. 433 (1965).

It is alleged that as a matter of "political realism," the majority in a large multi-member district will tend to have an inordinate influence in the political life of the State; that a voter, for example, in a four-member district will have four members of the legislature "who will be especially concerned with his views and interests and amenable to his persuasion, since they will want the benefit of his

suffrage for reelection." *Drew v. Scranton*, 229 F. Supp. 310, 327 (M.D. Pa. 1964), *remanded on other grounds*, 379 U.S. 40 (1964). This argument "ignores the practical realities of representation in a multi-member constituency." *Fortson v. Dorsey*, 379 U.S. 433, 437-38 (1965). It assumes that each voter in a four-member district will have influence over all four legislators, and that all four legislators from that district will respond in the same manner or cast their votes in the same fashion in the legislature. There is no assurance that any voter has any influence over any of the four legislators, just as there is no assurance that any voter in a single-member district will have influence over his lone legislator. Then, too, each legislator from a multi-member district depends for his tenure upon a district-wide vote and thus must be vigilant to serve the interests of all the people in the district.

Appellant in Case No. 318 points out that each of the four, four-member senatorial districts controls 16% of the Senate.[16] Thus, he argues, one senatorial district can have a large voice in the Senate. It assumes, however, that all four of the Senators from a four-member district will vote alike, and that all four of them are amenable to a voter or a given group of voters within the district. An analogy is submitted in Appellant's brief to the National Presidential campaign where the candidates concentrate on those states with the largest number of convention or electoral votes. The analogy is misplaced. In the first place, Hawaii legislators are not elected on a state-wide basis making it necessary for candidates to concentrate their campaign on the larger multi-member districts. Each legislator is elected from his own district, confining his campaign efforts to his

---

[16]The 17% figure used by the Appellant in Case No. 318 is mathematically incorrect.

district only. In the second place, if Appellant meant to intimate that organized pressure groups or external influence will find their tasks easier by concentrating on Senators from multi-member districts, it assumes that all Senators from one multi-member district will vote alike or that the same effort will not be required to reach the same number of Senators regardless of the districts they represent. Thus, any four Senators will constitute 16% of the Hawaii Senate. What proof is there that it is easier to secure this 16% if they all come from the same district than if they come from different, single-member districts?

It is contended that in Hawaii, even in multi-member districts, the relationship between the legislator and his constituent is direct and immediate. Thus, it is said, the overrepresentation is accentuated. Again, this is an assumption, for which no proof has been offered. And, if it be the case, does it not speak more for the Legislature's determination that public interest requires the election of legislators oriented to state-wide problems rather than purely local issues?

To be sure, this Court in *Fortson v. Dorsey*, 379 U.S. 433 (1965), stated that it was not intimating that in all instances multi-member districting system comports with the dictates of the Equal Protection Clause; that the multi-member districting system might, under the circumstances of a particular case, designedly or otherwise, operate to minimize or cancel out the voting strength of racial or political elements of the voting population. But, it said, "When this is *demonstrated* it will be time enough to consider whether the system still passes constitutional muster." 379 U.S., at 439 (Emphasis added.)

2. *The fact that some multi-member senatorial districts and some representative districts have the same or nearly identical boundary lines does not result in disproportionate representational advantage for the voters of these districts over other voters of the State.*

The District Court held, and the Appellant in Case No. 318 contends, that the large multi-member districts of the Senate superimposed over the large multi-member districts of the House intensifies the overrepresentation of the large districts. (R. 159, 240 F. Supp., at 729; GO-Br. 101) Particular reference is made to the proposed Third Senatorial District and the Eighth Representative District which have the same boundaries, and to the proposed Sixth Senatorial District and the Fifteenth Representative District which have nearly identical boundaries. That area bounded by the proposed Third Senatorial District and the Eighth Representative District will elect three Senators and four Representatives, or approximately 10% overall of both chambers of the Legislature, and that area bounded by the proposed Sixth Senatorial District and the Fifteenth Representative District will elect four Senators and six Representatives, or approximately 13% overall of both chambers of the Legislature. The point, however, that must be remembered is that the reason why the area bounded by the proposed Sixth Senatorial District and the Fifteenth Representative District elects 13% overall of both chambers of the Legislature is that, that area contains 13% of the registered voters in the State. The area bounded by the Third Senatorial District and the Eighth Representative District elects overall approximately 10% of both chambers of the Legislature, because it contains approximately 11% of the registered voters in the State. It would be well to remember, too, that voters in even the smallest representative districts on Oahu,

i. e., the Ninth and the Thirteenth Representative Districts, get to vote for a total of six legislators.[17]

Surely, it cannot be said that the vote of a voter of any district, senatorial or representative, is not approximately equal in weight to that of another voter in another district. Without further evidence, how can it be said that districting of the senatorial and representative Districts, on the multi-member system, "minimizes or cancels out the voting strength of racial or political elements of the voting population," or that there is invidious discrimination. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

3. *There is no evidence showing that the Senate multi-member districting system submerges minorities.*

Appellant in Case No. 318 states that he is not contending that districts must be aligned to assure success at the

---

[17]The number of Senators and Representatives which the voters in each representative district on Oahu will vote for, as a result of the proposed Senate Reapportionment Plan and the existing House apportionment, is as follows:

Representative District	Number of Senators	Number of Representatives	Total
8	3	4	7
9	4	2	6
10	4	4	8
11 (Regardless of Precinct)	4	3	7
12	4	3	7
13	4	2	6
14 (Regardless of Precinct)	4	4	8
15	4	6	10
16	4	4	8
17	4	4	8

polls for any race. But, he complains that multi-member districting system denies fair representation to all people and submerges minorities. He states, that under the multi-member districting system, "the majority voice . . . speaks loudly, [but] the minority voice may not speak at all." (GO Br. 80) He admits that no "extensive" proofs were put in as to the details of submergence of minorities, but states that the existence of minorities in the multi-member district is "plain".

As Appellant admits, the record in this case is barren of any evidence showing what group is in the majority or advantaged, what minority is submerged, and how the minority is submerged by the multi-member districting system. Surely, there are minorities in single-member districts just as there are in multi-member districts. How then are the minorities so submerged under multi-member districting system as to violate the Equal Protection Clause, while the same would not be true under the single-member districting system?

"Minority" implies a group of people sharing common interests. But a voter does not necessarily fall within one and only one interest group. Depending on his diversity of interests, he may belong to two or more interest groups. And, he may, at the same time, be in that group which represents the majority on one issue and be in another group which represents the minority on another issue. A majority, it has been said, is temporary; that it is formed by an alliance of groups on a particular issue, which may disperse to form new alliances on another issue.[18] The

---

[18]See Dixon, *Crucial Issues in Reapportionment is Between Majoritarian Democracy and Consensus Democracy*, 1963 NAT'L CIVIC REV. 543, 544 (1963); McKay, *The Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487, 498 (1963).

Appellant in Case No. 318 complains that although there is equality in the weight of votes of voters in the Hawaii legislative districting system, there is no equality in representation. But, equality of representation for interest groups cannot be assured unless each interest group is specifically identified and given representatives of its own.[19]

4. *The multi-member districting system does not denigrate the principle of majority rule.*

The contention that multi-member districting system denigrates majority rule is purely conjecture. It has never been shown that the principle of majority rule is any more safe under the single-member districting system than under the multi-member districting system. Theoretically, of course, in a single-member district, the winner of the election, with two candidates running, will have a majority of the votes. But, it is the majority of the votes cast, and not necessarily a majority of the registered or qualified voters within the district. Then, too, the election of legislators in each district by a majority of the votes cast within the district does not necessarily mean that the entire make-up of the Legislature will reflect the sentiments of the majority of the voters throughout the State. Commentators generally agree that it is indeed possible for a party or group to win in several single-member districts by slim margins and secure majority control of the Legislature, and yet not have the majority of the state-wide votes.[20]

---

[19]See pp. 63 to 74, *infra*.

[20]This result is possible, for example, if a state were divided into ten single-member districts, with 100 voters in each district. The districts may be so aligned, designedly or otherwise such that Party A candidates may win in six districts by a slim 55 - 45% margin and lose in four districts by a 25 - 75% margin. The total popular vote for Party A candidates would be 430 as compared to the total popular vote for Party B candidates of 570, and yet Party A would be in

Majority rule then is much more than simply winning seats in the districts by a simple majority. Majority rule in a State means rule by the majority of the people *throughout the State*. There is no assurance that this end is achieved better under the single-member districting system than under the multi-member districting system. Indeed, political realities indicate that the principle of majority rule is achieved by a route which entails much more than simply securing the majority of the votes cast within a district. The practice of "block voting" and failure to vote for the full slate, undesirable though they may be, are indeed factors which influence the often delicate balance between a majority and a minority.

In the absence of proof, it is respectfully submitted that it cannot be said that the Hawaii legislative apportionment plan denigrates majority rule or otherwise invidiously discriminates against, or dilutes the weight of the vote of a voter in one district over those of another in another district.[21]

---

control of the Legislature. For other examples, see Silva, *Compared Values of the Single- and the Multi-Member Legislative District*, 17 THE WESTERN POLITICAL QUARTERLY, 504, 512-13 (1964); Dixon, *Crucial Issue in Reapportionment is Between Majoritarian Democracy and Consensus Democracy*, 1963 NAT'L CIVIC REV. 543, 545; Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 387 (1963); see also Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209 (1964).

[21]"Students of government have known for years that single-member district system has a strong tendency to overrepresent the majority party." Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 227 (1964). Professor Dixon discusses the various ramifications of the multi-member districting system and the single-member districting system and apparently finds that there is no assurance that the minority is not submerged in either system.

IV. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THE FORMATION OF HOMOGENEOUS DISTRICTS BASED ON ETHNIC, POLITICAL, SOCIO-ECONOMIC, INDUSTRIAL AND OCCUPATIONAL COMPLEXION IN THE APPORTIONMENT OF THE HAWAII STATE LEGISLATURE, NOR DOES IT REQUIRE THAT EACH OF THESE DIVERGENT INTERESTS HAVE POTENTIALLY EQUAL REPRESENTATION IN THE STATE LEGISLATURE.

Hawaii, by its nature, is multi-racial. It has the aged and the youths among its voter population. It counts among its populace those in the professional class as well as those in the lower socio-economic class, such as laborers, operatives and clerical workers. It has its share of the widows and the retired. Its politics is generally anchored on the two-party system. The District Court in its April decision (R. 151, 240 F. Supp. 724) held that both the House and the Senate must be apportioned among homogeneous districts constructed around these varied interest groups in such manner that each divergent interest may have potentially equal representation in the Hawaii Legislature.

The Hawaii House of Representatives (as apportioned under the Hawaii Constitution) and the Hawaii Senate (as apportioned under the proposed Senate Reapportionment Plan) are both apportioned among districts with substantially equal population, with the resultant substantial equality in the weight of votes of all voters throughout the State. Within the constitutional limitations of equal-populations (and the constitutional prohibition against classification based on race or sex), it is possible for the Hawaii Legislature to be apportioned among districts with widely varying demographic character and political interests. The Equal Protection Clause does not require that the divergent interests be grouped into homogeneous districts. To require judicially that each of the divergent interests be grouped

into homogeneous districts and that each such interest group be given potentially equal representation in the State Legislature is to deny to the political community of Hawaii the right to shape the populace-composition of the legislative districts in the light of its concept of "representative government", its determination of public policy and needs, and the existing conditions within the State.

A. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States focuses its attention upon the protection of individuals, not interest groups.

The Equal Protection Clause protects individuals, not special interest groups or classes. Thus, no state is to "deny to *any person* . . . the equal protection of the laws." Of course, an individual may fall within an interest group or class of people, and the voting strength of an individual must not be minimized or canceled out simply because he belongs to a racial, religious or political group. *Fortson v. Dorsey*, 379 U.S. 433 (1965). However, the Equal Protection Clause nevertheless protects a person, not a group or class.

In the apportionment of a state legislature, the Fourteenth Amendment requires that *each man's* vote be given weight equal to the weight of the vote of every other man. While it may be politically or socially desirable or even perhaps necessary that a class or group be represented in the legislature, the Fourteenth Amendment neither requires it nor does it protect it. The State legislature represents people, not groups or classes.

This Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), commented:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Id.*, at 562.

"But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Id.*, at 579-80.

"[R]epresentative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Id.*, at 560-61.

If "majority rule" really means what it says, then it must be a majority of the people, and not of groups or group interests.

"Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conduce differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

Desirable and even necessary though it may be to provide for the protection of minority groups, the Constitution does not require that each minority group be given representational rights and potentially equal representation in the State Legislature.

Not only does the Constitution not require that groups be given representational rights, the practical problems dictate against it, and it may well be that potentially equal representation of groups will tend to subvert the equal-populations principle.

B. Practical problems militate against the construction of legislative districts around homogeneous interest groups.

There are varied and numerous interest groups in the Hawaii community. Any attempt to structure the legislative districts around homogeneous interest groups is fraught with difficulties.

1. *There is no practical way of determining the relevant minority interest groups which are entitled to representation in the State Legislature.*

Each person belongs to some interest group by choice or otherwise. Thus, by reason of his annual income, he belongs to either the higher socio-economic group or the lower socio-economic group. The fact of birth places him in one racial group or another. By reason of occupation, he may be a laborer or a part of the managerial group or a clerical worker. But a person may belong to two or more minority interest groups at the same time, depending on his varied interests. Thus, he may be a laborer and yet be in the upper middle class; a widower and in the lower income group; a clerical worker and a conservative in politics. And, in each minority interest group, there are likely to be factions or splinter groups. Thus one professional may be a liberal, the other conservative; one in a managerial position in a high income bracket and the other in a low income bracket. And, a person may shift from one interest group to another depending on variable factors. Thus, a clerical worker may become a manager through promotion; a laborer may become a professional through education; and a person in one racial group through inter-marriage may become associated with another racial group. The possibilities are numerous. Each minority group is not confined within any geographic area; it is spread out over the State. It transcends the boundaries of legislative districts and political boundaries.

Out of these minority interest groups a majority in American representative government is formed. A "majority" is an alliance of various minority groups which overlap and intersect. It cuts across racial, ethnic, religious, socio-economic, industrial, occupational and other interest groups. But these alliances are temporary, and, therefore, majorities are temporary. Minority interest groups get together to form an alliance which may be the majority on a given issue. They then disperse to form new alliances on other issues.[22]

In any effort directed toward the creation of homogeneous districts based on interest groups, the inevitable question is, which of the identifiable minority groups are relevant and require representation in the State Legislature. To prefer some is to deny representational rights to others.

The District Court apparently was of the judgment that race, social groupings, economic status, political affiliation, industry and occupation are the relevant groups entitled to representation. It pointed to the proposed Fifth, Sixth, and Seventh Senatorial Districts. It said that the Fifth Senatorial District contains a "multitude of Caucasian widows in the upland areas," "an overabundance of Filipino males in the seaward portion," and a "very high proportion of persons of foreign birth or Asiatic ancestry, of the lower-middle socio-economic group" in the Twelfth Representative District encompassed within the Fifth Senatorial District. (R. 157-158) The Sixth Senatorial District, the court said, contains a high proportion of persons of Japanese ancestry in the Moiliili area, high concentration of Caucasians in the Waikiki area, high-level professional, technical and managerial

---

[22]See Dixon, *Crucial Issues in Reapportionment is Between Majoritarian Democracy and Consensus Democracy*, 1963 NAT'L CIVIC REV. 543, 544 (1963); McKay, *The Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487, 498 (1963).

people in Waikiki and upper Manoa, and operatives, laborers, clerical workers, middle and lower-middle income people in the central area. (R. 157) The Seventh Senatorial District, the District Court noted, includes the high income and professional and managerial group of the Seventeenth Representative District and the lower socio-economic laborers, operatives and clerical workers of the Sixteenth Representative District. (R. 158)

The record shows, however, that the Fifth Senatorial District has been rapidly changing from upper middle class residents to an average urban community of below upper middle class (R. 310) ; the drawing of the senatorial district line between the Fifth and Sixth Senatorial Districts separates the industrial Kakaako area from the central business district and provides a "clear distinction between areas of different social and housing, economic characteristics" (R. 323) ; and the division between the Sixth and Seventh Senatorial Districts separates the high-rise and apartment area from the single family residential area (R. 323). Thus, to Schmitt, another relevant group was housing. To this might be added other relevant groups such as age, sex and religion. Any attempt to select from all the possible groups certain ones as relevant and entitled to representation presents opportunities for errors in some interest groups being left out entirely.

The selection of relevant minority groups entitled to representation is further complicated by the difficulty in ascertaining which interest groups are in the majority and which are in the minority. Majorities being temporary, an interest group may be in the majority in one instance and in the minority in another. And, a person belonging to two or more minority interest groups may be in the majority on one issue and in the minority on another. Thus, it is difficult to determine at any given moment whether a person

or an interest group is among the majority or among the minority. The District Court's opinion and the contention of Appellant in Case No. 318 (GO Br. 80-84, 101-02) that minorities are submerged in multi-member districts suffer from this inability to point out who or what group is advantaged and who or what group is disadvantaged by the apportionment of the House and the proposed reapportionment of the Senate. Of the two racial groups in the proposed Sixth Senatorial District, for example, which is the advantaged and which the disadvantaged? In the proposed Seventh Senatorial District, which of the two groups (the professional-managerial, high socio-economic group or the lower socio-economic laborers, operatives and clerical workers) is in the majority and which in the minority? The advantaged and the disadvantaged are not identified in either the District Court's opinion or in Appellant's brief.

The difficulties inherent in identifying the relevant minority groups which should be entitled to representation in the State Legislature, in determining to which minority interest group a person should be placed and the opportunities for errors in some interest groups being left out entirely lead inevitably to the use of geographic districts as the most workable indirect alternative.[23]

2. *The difficulty in identifying relevant groups entitled to representation in the State Legislature was apparent in the Hawaii Reapportionment case.*

Robert Schmitt, the expert witness, was requested by the Governor of Hawaii to prepare a working set of maps showing twenty-five proposed single-member senatorial districts and fifty-one proposed single-member representative dis-

---

[23]Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker V. Carr*, 61 MICH. L. REV. 711, 766 (1963)

tricts. A set of such working maps was prepared based on the 1960 census total population with census tracts and census county division boundaries. (Plaintiffs' Ex. 6, R. 242, 247, 340; Plaintiffs' Ex. 7, R. 243, 249, 341; Plaintiffs' Ex. 8, R. 243, 252 (unprinted); Plaintiffs' Ex. 9, R. 342)[24]

In working up the district lines along census enumeration districts, Schmitt gave homogeneity of the districts little importance, if at all, because of the difficulties entailed.

> "In our set of maps based on census tract boundaries, and using 1960 total population, we disregarded homogeneity of districts, feeling that first of all in the Legislative Reference Bureau's analysis of the Supreme Court decisions, homogeneity had been given, I would say, tertiary importance. The stress had been on substantial [e]quality of population first; second, on contiguity and compactness of the areas. And only after some minor points, social, ethnic, political homogeneity. And, of course, as a practical matter, the very first of those criteria was so difficult to achieve, using the rather unwieldy building blocks we had to work with, that we were happy to achieve this substantial equality of population regardless of any violations of ethnic identity or economic homogeneity . . ." (R. 225)
>
> "We could make no effort to try to combine or separate such areas. It was too difficult a task. So we ignored that criteria." (R. 226)

The very homogeneity mandated by the District Court was thus extremely difficult, if not impossible, to attain,

---

[24]This set of plans was later set aside and a new set was prepared for the Governor because of mechanical difficulties in the registration of voters if census tracts were used rather than the existing precincts. (R. 224)

even with the use of census tracts as the Appellant in Case No. 318 strongly urges in his brief.[25] The very objection raised by the District Court with reference to the Seventh Senatorial District proposed by the Senate Reapportionment Plan would exist even in single-member districting using census tract lines. There would still be a primarily Caucasian, managerial and strong Republican oriented area and a primarily Hawaiian homestead, low income and strong Democratic inclined area within the same district. (R. 225-226) Unfortunately, the record is barren of any evidence to indicate the heterogenity or homogeneity of the other districts proposed along census tracts. It would not be surprising, however, if some of these other districts built along census tracts were shown to be just as heterogeneous as the existing House districts and the proposed Senate districts.

C. The construction of legislative districts along homogeneous characteristics of the people will tend to subvert the equal-populations principle.

This Court held that geography, political subdivision lines and the principle of compactness and contiguity are indeed not only relevant in the drawing of district lines, but perhaps even necessary if partisan gerrymandering is to be minimized. *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964). Mindful of this admonition of this Court, the Hawaii Legislature constructed the proposed Senatorial Districts along established geographical, historical, natural and governmental unit lines; it "relied very heavily upon compactness

---

[25]Appellant in Case No. 318 suggests that failure to follow census tract lines indicates arbitrariness of the boundaries and district size in the multi-member districting plan for the House and the Senate of the Hawaii Legislature. (GO Br. 74, 102) There is no magic in census tract lines and the State Legislature is surely not required to follow lines established by administrative branches of other levels of government. (See pp. 46 to 51, *supra*.)

and contiguity"; and it considered areas of population concentration and existing communities.[26] The districts have been described as logical and meaningful, and the districts are proportionately equal in population.

If interest groups have right of representation in the State Legislature, that right cannot achieve full vindication nor can the right of representation of every group be potentially equal to the rights of other groups in any representative system where the districts are based primarily on geographic lines and on the principle of compactness and contiguity.[27] A full vindication of that right and a truly equal representational right will require substantial deviation from the rule of equal population districts in the light of the varied sizes of the interest groups and the geographic span of each throughout the state.

D. The role of minority interest groups in representative system of government is for the political body to determine and is better accomplished by the political body.

There are, of course, various ways in which legislative districts can be constructed, and this holds true whether single-member districting system or multi-member districting system is employed. The districts may simply follow natural, geographic, historical and other statistical lines; they may follow existing governmental boundaries; or they may be aligned along functional divisions of the population.[28] The Hawaii Legislature exercised its judgment and constructed the proposed Senatorial Districts substantially

---

[26]See pp. 49 to 51, *supra.*

[27]Lucas, *Legislative Apportionment and Representative Government:* The Meaning of Baker V. Carr, 61 MICH. L. REV. 711, 772 (1963).

[28]See DE GRAZIA, APPORTIONMENT AND REPRESENTATIVE GOVERNMENT 20 (1963).

along geographical, historical, natural and government lines. It adhered to the principle of compactness and contiguity. In exercising this judgment, the Hawaii Legislature was concerned that otherwise, districting may provide an open invitation for partisan gerrymandering. (R. 124, 135) The size of the districts and the component parts thereof were all influenced by the shape of existing factors.[29] To conclude from this that the Legislature gave sparse, if any, consideration to the role of interest groups assumes too much.

Along with its decision to follow established lines and to adhere to the principle of compactness and contiguity, the Hawaii Legislature was guided by its policy decision that legislative districts should foster the election of legislators oriented toward state-wide, rather than purely local, problems. (R. 123, 134). Implicit in this policy decision is that legislators ought to represent a middle-of-the-road approach to problems. But, such middle-of-the-road approach is hardly possible if legislators represent identified, specific interest groups. Representatives of special interest groups would naturally tend to take rather narrow viewpoint of the group itself and be strong and positive in their stands.

The question of the role of interest groups in government is indeed part and parcel of the American system of "representative government." To admit that interest groups are relevant in "representative government" is one thing, to give each such group equal representation in the State Legislature is another. What the role of interest groups should be and how government should be structured to enable the interest groups to play that role goes to the core of any theory of "representative government". The task of defining the role and structuring government to enable the inter-

---

[29]See pp. 35 to 46, *supra*.

est groups to perform that role is better left to the political arm of government, for the definition and the structure will depend on philosophy, theories, policies and judgment of the political community.

The system of districting which adheres to geographic considerations and to the principle of compactness and contiguity, when coupled with the requirements of equality of population "simply substitute[s] the cast of the dice in terms of concentration and dispersion for some more reasonable effort to see that a wide variety of points of view achieve representation in legislative deliberations." [30] The Hawaii Legislature's determination to foster the election of legislators oriented toward state-wide problems and taking generally a middle-of-the-road approach to problems implies that the Legislature, while cognizant that interest groups do have a role to play in representative government, determined it to be in the best interest of the State that these interest groups find expression through the election of legislators who represent the consensus of the various groups within their respective districts rather than through the direct election of legislators from each of the minority groups.[31]

---

[30]Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker V. Carr*, 61 MICH. L. REV. 711, 772-73 (1963).

[31]"The most workable indirect alternative is, of course, geographical districts. The assumption is that like people are apt to live contiguously, or at least that different areas of the state live with different problems, with all of which the state must deal, and that rational decision on these affairs is aided by the presence of representatives who have lived with them. Representative assemblies are, after all, only partially devices for measuring popular will; they are also deliberative in nature. It is assumed that when the views of a wide sampling of the public have been aired and discussed, action will result or not, according to rational consensus. This is not to say that there may not be issues on which consensus cannot be achieved, but rather that all representative schemes are designed

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING THE LEGISLATURE FROM ENACTING LEGISLATION UNTIL A REAPPORTIONMENT LEGISLATION SATISFACTORY TO THE COURT HAD BEEN ENACTED.

The District Court by its order of April 28, 1965, rejected the Senate reapportionment plan which had been submitted to it by the Hawaii Legislature, and reinstated the injunction contained in its order dated February 17, 1965. The injunction enjoined the Hawaii Third State Legislature from enacting any legislation, except such as were necessary to organize the respective houses at the 1965 regular session and to appropriate funds for the session, until the Legislature enacted appropriate legislation for the submission to the voters of Hawaii the question whether or not a constitutional convention should be convened. (R. 80, 238 F. Supp., at 479)

While patently, the injunction appears to have been aimed at legislative action during the 1965 regular session, which session is now adjourned,[32] the injunction is directed to the individual State Senators and Representatives who are parties to this case and who are all members of the Hawaii Third State Legislature. Under the provisions of the Hawaii Constitution, the life of the Third State Legislature does not expire until at least the next general election (November, 1966) and the Third State Legislature is required

---

only partly with an eye to the resolution of such problems. In many instances a preference has been shown for leaving them unsolved until more than a majority can be obtained in support of a particular solution. Sometimes, indeed, we have taken them out of the democratic process altogether." Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker V. Carr*, 61 MICH. L. REV. 711, 766 (1963).

[32]The 1965 Regular Session of the Third Hawaii Legislature adjourned *sine die* on June 1, 1965.

to convene again in regular session in February, 1966.[33] In addition, the Hawaii Constitution authorizes the Governor of the State to convene the Legislature, or the Senate alone, in special session at any time. Thus, the injunction is conceivably applicable to the actions of the Third State Legislature at its future legislative sessions.

The District Court's injunction is unnecessarily harsh in its terms and constitutes an abuse of judicial discretion.

Article III, section 1 of the Hawaii Constitution provides:

> "The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States."

Thus, the Hawaii Legislature is invested with the full panoply of legislative powers. The injunction, however, prevents the State Legislature from exercising these powers. It prevents the State Legislature from considering legislations necessary for, and of vital importance to the health, safety and welfare of the people of Hawaii and the orderly functioning of both State and County governments. It not only prevents the Legislature from considering policy legislations, but it also prohibits the Legislature from considering budgetary items necessary for the normal operation of the State and County governments.

In none of the decisions of the federal district courts, relating to the reapportionment of state legislatures, which have come before this Court for review, except *Fortson v. Toombs*, 379 U.S. 621 (1965), has there been such drastic

---

[33]The Hawaii Third Legislature will convene in Regular Session on February 16, 1966.

orders mandating the legislature to pass a constitutionally valid reapportionment plan or enjoining the state legislature from discharging its duties. This Court from time to time has wisely refrained from fashioning remedies or attempting to delineate the boundaries of possible remedies.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court stated:

> "We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. * * * In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon *general equitable principles*. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." 377 U.S. 533, 585. (Emphasis added.)

In the *Reynolds* case, this Court commended the federal district court for acting with "proper judicial restraint" after the Alabama Legislature failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment plan. The District Court in Alabama ordered the 1962 elections to be held under a temporary reapportionment plan fashioned by the Court from the best parts of two proposed plans of the state legislature, although both of the proposed plans were constitutionally invalid.

In *Fortson v. Toombs*, 379 U.S. 621 (1965), the State of Georgia was allowed to conduct its 1964 election under an invalid plan. The federal district court had earlier enjoined the state election officials from placing on the ballot in the 1964 election or at any subsequent general election any constitutional amendment proposed by the invalidly apportioned Georgia Legislature. On the date of the 1964 general election, the order was amended to authorize the election of the state legislature under the invalid plan; the order, as amended, however, enjoined the legislature elected in 1964 from conducting any legislative business except during the 1965 45-day session. This amended order, in effect, enjoined the legislature elected in 1964 from conducting any legislative business in the 1966 session.

While this Court did not pass on the question of the validity of the amended order restricting the legislature elected in 1964 from conducting any legislative business in 1966, this observation was made in that opinion which concurred in part with, and dissented in part from the majority opinion:

> "[A]s to the provision of the lower court's original decree limiting the functions of the 1964 legislature, it seems scarcely open to serious doubt that so long as the federal courts allow this Georgia Legislature to sit, it must be regarded as the de facto legislature of the State, possessing the full panoply of legislative powers accorded by Georgia law." 379 U.S., at 626.

In *Roman v. Sincock*, 377 U.S. 695 (1964), suit to reapportion the state legislature was commenced in early 1962. The District Court stayed the proceedings to give the legislature time to enact an amendment to the constitution by August 7, 1962. On July 30, 1962, the legislature passed an amendment to the constitution. The constitution required a

two-thirds vote in each of two successive state legislative sessions for the amendment to become effective. In August of 1962, the District Court denied further stay of proceedings, but it also denied the preliminary injunction to prevent the November 1962 election from being held under the old, invalid constitutional provision. In January, 1963, the legislature adopted the proposed constitutional amendment for the second time by the necessary two-thirds vote. In April, 1963, the District Court held that both the old constitutional provision and the amendment were invalid and contrary to the Fourteenth Amendment of the Constitution of the United States, and gave the legislature until October, 1963, to adopt a constitutionally valid plan for use in the 1964 election. This Court upheld the District Court's injunction, but remanded the case to the District Court and left it up to the District Court to determine whether or not the state legislature should have additional time for enactment of a constitutionally valid reapportionment plan.

The Hawaii Legislative Apportionment case has been before the District Court since August, 1964. At the time of the writing of this brief, it is not quite a year and a half since the original suit was filed. Most of the State legislative apportionment cases which have come before this Court have had juridical history lasting far more than the year and a half experienced by Hawaii.[34] Yet, in all of these cases, this Court remanded for further proceedings, confident that the District Courts would fashion appropriate remedies in accordance with equitable principles.

---

[34]In *Reynolds v. Sims*, 377 U.S. 533 (1964), suit began on August, 1961, and this Court did not render its decision until 1964; in *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), suit was commenced in August, 1960, and this Court did not dispose of it until June, 1964; in *Davis v. Mann*, 377 U. S. 678 (1964), suit was filed in April, 1962, and this Court rendered its decision in June, 1964.

It was hardly necessary for the Hawaii District Court to resort to such drastic measures. The Hawaii Legislature made two good faith attempts to fashion a constitutionally acceptable reapportionment plan, one at a special session in 1964, and again at its regular session in 1965. There is nothing in the record to indicate that the Hawaii Legislature would not have made further good faith attempts to fashion a plan constitutionally acceptable. In the light of this, enjoining future elections under the invalid Hawaii constitutional provisions, coupled with its powers to fashion at least temporary apportionment of its own would have served just as effectively in prodding the Hawaii Legislature to act with deliberate speed.

The error of the District Court lay in its belief that a constitutionally acceptable *permanent* plan was necessary for the 1966 general elections. None of the cases which have come before this Court and nothing in the record of this case indicate the necessity for fashioning a permanent reapportionment plan at such rate of speed to protect the rights of plaintiffs. Courts in other state reapportionment cases have proceeded cautiously and no more rapidly than was inescapably necessary.

VI. THE HAWAII LEGISLATURE HAS THE POWER TO ENACT AT LEAST A PROVISIONAL REAPPORTIONMENT PLAN FOR THE SENATE, PENDING ADOPTION OF A VALID CONSTITUTIONAL AMENDMENT, AND TO PROPOSE SUCH CONSTITUTIONAL AMENDMENT BY STATUTE.

The District Court in its order of February 17, 1965, held that the reapportionment of the Senate of the Hawaii Legislature must be by constitutional amendment. (R. 78, 238 F.Supp., at 478) While the District Court, by its order dated March 9, 1965, lifted temporarily its injunction contained in its order of February 17, 1965, to permit the Ha-

waii Legislature to enact appropriate reapportionment and redistricting plan for the Senate to be applicable in the 1966 elections, upon rejection of the plan submitted to the court on April 14, 1965, the District Court reinstated its initial injunction.

A. The District Court erred in precluding the formulation by the Hawaii Legislature of at least a provisional Senate reapportionment plan, pending the adoption of a valid amendment to the Constitution of the State of Hawaii. The injunction makes no provision for the enactment by the Hawaii Legislature of any reapportionment plan for the Senate.

The District Court having declared those provisions of the Hawaii Constitution relating to the apportionment of the Senate of the Hawaii Legislature invalid, those invalid provisions are no longer part of the Hawaii Constitution, and the Hawaii Legislature has inherent power to enact at least provisional reapportionment legislation. In *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), this Court, upon holding pertinent provisions of the Maryland Constitution relating to legislative apportionment invalid, said:

> "With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements." *Id.*, at 675-76.

The Constitution of the State of Hawaii in Article III, Section 1, grants to the State Legislature, broad powers extending to "all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." With the invalid Hawaii constitutional provisions relating to legislative apportionment no longer

a part of the Hawaii constitution, the matter of legislative apportionment becomes one of the "rightful subjects of legislation not inconsistent with this constitution" which can be dealt with by the Hawaii Legislature. This is in keeping with the holdings of this Court in *Maryland Committee v. Tawes*, 377 U.S. 656 (1964) and *Roman v. Sincock*, 377 U.S. ~~702~~ 695 (1964), that the primary responsibility for legislative reapportionment is in the state legislature.

B. The District Court erred in precluding the Hawaii Legislature from proposing necessary constitutional amendment for submission to the electorate.

The District Court's injunction mandated that the Hawaii Constitution be amended by the route of a constitutional convention. Under Article XV of the Hawaii Constitution, constitutional amendments may be proposed by (1) the constitutional convention; or (2) by the Legislature. A legislative proposal to amend the constitution requires the passage of the proposal by a two-thirds vote of each house of the Legislature at any session or by a majority vote of each house of the Legislature at two successive sessions. Hawaii Const., Art. XV, Section 3.

The District Court's mandate effectively precludes the Hawaii Legislature from formulating necessary constitutional amendments for submission to the electorate, or from, at least, exercising a choice between the legislative route and the more expensive route of a constitutional convention in amending Hawaii's Constitution.

Perhaps the District Court erroneously assumed that there could be no validly acceptable proposal for a constitutional amendment proposed by the Legislature, in the light of its failure to provide an acceptable provisional plan during the time alloted by the court in its March order. There is no valid basis upon which to speculate that the

Hawaii Legislature would not come up with a constitutionally acceptable provisional reapportionment and an acceptable permanent plan for submission to the electorate, should this Court reject the proposed apportionment of the Senate or the existing apportionment of the House of Representatives. Nor is there any evidence upon which to ground a belief that a provisionally reapportioned Hawaii Legislature would not enact and submit to the electorate an acceptable constitutional amendment.

The error of the District Court, further, lay in its belief that a permanent apportionment plan for the Hawaii Legislature must be in effect for the 1966 general elections (R. 78, 238 F. Supp., at 478).

Equitable considerations favor permitting Hawaii to exercise the option it has of choosing the route it shall take to amend its constitution.

C. The District Court erred in ordering that a constitutionally acceptable legislative apportionment plan be in effect for the 1966 General Elections.

The District Court by its February 17, 1965 order required that a constitutional convention be convened not later than October 15, 1965, and that proposed amendments to the Hawaii Constitution, relating to legislative apportionment be submitted to the electorate by not later than January 30, 1966 (R. 80, 238 F. Supp., at 479). The District Court in suspending its injunction by its March order, nonetheless required that a provisional plan be in effect for, and a permanent plan be submitted to the electorate at the November 1966 general election. (R. 89-90)

There is nothing in the record to indicate that such rapid time-table was necessary for the enactment of a permanent reapportionment plan. Nor has this Court in any of the cases coming before it, required so rapid a time-table for

the enactment of a permanent reapportionment plan. In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court noted that the district court "acted in a most proper and commendable manner," *Id.*, at 586, in putting into effect for the 1962 general election a plan of its own as a provisional measure, although admittedly, that plan, taken from the best parts of two legislatively proposed but constitutionally invalid plans, was itself invalid as a permanent apportionment of the state legislature. Then, in *Roman v. Sincock*, 377 U.S. 695 (1964), this Court remanded the case to the district court with the suggestion that the district court could determine whether or not the state legislature should have additional time for enactment of a constitutionally valid reapportionment plan, although the district court had earlier ordered that the Legislature come up with a plan not later than October, 1963, for use in the 1964 election.

In like vein, equitable principles suggest that the District Court exercise greater judicial discretion in permitting the Hawaii Legislature opportunity to consider both temporary and permanent apportionment plans.

VII. THE REFUSAL OF THE DISTRICT COURT TO INVALIDATE ALL PORTIONS OF THE HAWAII CONSTITUTION RELATING TO LEGISLATIVE APPORTIONMENT, EXCEPT THAT PORTION RELATING TO THE APPORTIONMENT OF THE SENATE, WAS PROPER.

The District Court's February order invalidated those provisions of Article III, Section 2 of the Hawaii Constitution fixing the number of Senators per Senatorial District. The remainder of Article III was declared constitutional and valid. (R. 79, 238 F. Supp., at 478) The Apellant in Case No. 318 contends that this was error and that the District Court should have invalidated all of the provisions

of Article III of the Hawaii Constitution relating in any manner to the apportionment of both the House and the Senate, including the provisions relating to the numerical sizes of both houses, restricting changes in the House district boundaries on decennial reapportionments, and requiring decennial reapportionments on the basis of the number of voters registered at "the last preceding general election."

A. The District Court's refusal to invalidate that portion of the Hawaii Constitution relating to the apportionment of the House of Representatives was proper.

The Appellant in Case No. 318 urges that the District Court, when it invalidated the Hawaii constitutional provisions fixing the number of Senators per senatorial district, should have also invalidated those provisions relating to the apportionment of the House, whether or not the House, taken alone, met the constitutional test of the Equal Protection Clause. The District Court's refusal to invalidate the constitutional provisions relating to the apportionment of the House was couched in these words:

> "3. The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied." (R. 79-80, 238 F. Supp., at 478-79)

This Court held in *Maryland Committee v. Tawes*, 377 U.S. 656, 673 (1964):

> "Regardless of possible concessions made by the parties and the scope of the consideration of the courts below, in reviewing a state legislative apportionment case

this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral legislature. We therefore reject appellee's contention that the Court is precluded from considering the validity of the apportionment of the Maryland House of Delegates."

These Appellants in No. 409 do not contend that this Court should not look at the apportionment of the Hawaii House of Representatives in ruling on the validity of the Hawaii Senate Reapportionment Plan, but do contend that even when viewed in the light of the apportionment of the House of Representatives, the Senate Reapportionment Plan is constitutionally acceptable, and that the apportionment of the House and the proposed reapportionment of the Senate both meet the requirements of the Equal Protection Clause.

In *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), this Court did not hold that the district court could not find one house of a bicameral state legislature to be validly apportioned and the other not. What this Court held was that *upon review* by this Court it will view the apportionment of the legislature as a whole. One house of a bicameral legislature, by itself, may be constitutionally apportioned, although it may contain minor disparities from the equal-

populations principle. This Court is concerned that those minor disparities may be aggravated upon the reapportionment of the other house as to make the apportionment of the entire house constitutionally suspect. Thus, it necessarily must view the entire legislative apportionment, even though only one house of the legislature is the subject of reapportionment, and regardless of the matters decided by the district court to determine whether the disparities, if any, in the house found constitutionally valid, are offset or aggravated by the reapportionment of the other house.

"Deviations from a strict population basis, so long as rationally justifiable, may be utilized to balance a slight overrepresentation of a particular area in one house with a minor underrepresentation of that area in the other house. But, on the other hand, disparities from population-based representation, though minor, may be cumulative instead of offsetting where the same areas are disadvantaged in both houses of a state legislature, and may, therefore render the apportionment scheme at least constitutionally suspect." *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 735, note 27 (1964).

Continuing, this Court said:

"Of course the court below can properly take into consideration the present apportionment of seats in the House [which was apparently properly apportioned on the equal-populations principle] in determining what steps must be taken in order to achieve a plan of legislative apportionment in Colorado that sufficiently comports with federal constitutional requirements." *Ibid.*

Thus, *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), was not meant to preclude the power of the lower courts

to uphold the validity of the apportionment of one house of a bicameral legislature. Lower courts have, at least, a discretion whether or not to recognize the validity of the apportionment of one house in determining the course it will take to cause the state legislature to be apportioned in accordance with the mandates of the Equal Protection Clause. In the case of the Hawaii Legislature, the District Court exercised that discretion, and, in an effort to bring about the apportionment of the Legislature as a whole to comport with the Equal Protection Clause, it ordered the Senate to be reapportioned. The State Legislature did just that. The subject of inquiry before this Court is whether or not the proposed Senate Reapportionment Plan resulted in the apportionment of the State Legislature which complies with the requirements of the Equal Protection Clause. In making that determination, this Court is not precluded from viewing the proposed Senate reapportionment in the light of the apportionment of the House of Representatives.

In the *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964), the subject of scrutiny was the State constitutional amendment reapportioning both houses of the Colorado Legislature. Both the parties and the district court assumed that the Colorado House was properly apportioned on the equal-populations principle by a statute passed pursuant to that constitutional amendment. This Court held it need not pass on the validity of the House apportionment since the Senate, apportioned pursuant to the same constitutional amendment, was clearly not apportioned in compliance with the equal-populations principle. In the case of Hawaii, both the House and the Senate as proposed are apportioned on the principle of equal populations.

In *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), both houses were in fact apportioned on basis other than

the equal-populations principle. In contrast, the Hawaii House of Representatives was, from the inception of this case, apportioned on the equal-populations principle, and the Senate Reapportionment Plan resulted in both houses of the Hawaii Legislature being apportioned on the equal-populations principle.

Having passed that test of equal-population, the burden then was upon the opponents of the proposed apportionment of the Hawaii Legislature to demonstrate wherein such apportionment of the Hawaii Legislature was so invidious or without rationality or reflective of no policy as to violate the Equal Protection Clause.[35] That the burden has not been carried is amply shown above in this brief. It is enough to summarize here that no proof was ever offered in the District Court to support the Appellant's alleged speculative results which he says flows from the apportionment of the Hawaii Legislature.

B. The District Court's refusal to invalidate that portion of the Hawaii Constitution relating to the numerical sizes of the House and the Senate, the restrictions on changes in House district boundaries on decennial reapportionments, and the last general election as the basis for determining the number of voters registered on decennial reapportionments was proper.

1. *Numerical sizes.* There is no magic in the numerical size of the respective houses of the State Legislature. The Proceedings of the Hawaii Constitutional Convention reveal that much thought went into the selection of a 25-member Senate and a 51-member House. (Plaintiff's Ex. 11, R. 258, 343)

Thus, with respect to the Senate:

"The Committee proposal increases the membership of the senate from its present 15 to 25. . . . The majority

[35]See pp. 20 to 26, *supra*, on the matter of burden of proof.

of the members of the Committee felt that the present size of the senate, 15 members, was too small. There was general agreement that it should be larger. There was no unanimity as to the exact size that it should be.

" . . .

"This was not the only size for the senate that was considered. The Committee discussed retaining the present 15 member senate, a senate of 19 members, a senate of 20 members with the Lieutenant Governor as its presiding officer, a senate of 21 members and a senate of 23 members. . . . The retention of a 15 members senate was vigorously proposed by some members, but was rejected by a majority of the committee members." (R. 346)

With respect to the House:

"A majority of the members of your Committee was of the opinion that the present representation enjoyed by the neighbor islands should not, at least for the present time, be decreased. With a 51-member house, apportioned equally among the several major island units, the present representation is maintained, although the representation for the island of Oahu is increased from twelve members to 33 members.

"The cost to the state of a Legislature, with a 51-member house and a 25-member senate, was discussed at some length by your committee incident to the question of having biennial or annual sessions of the legislature . . . the majority of the members of the committee felt that the state could afford to have both a large legislature and annual sessions."

The numerical size of the legislature rests on the judgment of the body politic. *Reynolds v. Sims*, 377 U.S. 533,

581, note 63 (1964). The Hawaii Constitutional Convention exercised that judgment. The District Court found that there was nothing invidious about the selection of the numbers 25 and 51 and pointed to Plaintiffs' Exhibit 14, Table 14 (R. 260, 374), as clearly illustrating that there is "no built-in magic or invidiousness in the use of such numbers." (R. 66, note 4, 238 F. Supp., at 472, note 4)

The body politic, through the Hawaii Constitutional Convention, having exercised its judgment, the District Court acted properly in refusing to substitute its judgment for that of the body politic. Simply because the District Court did not invalidate the numerical size of each house of the Hawaii Legislature, did not prevent the Hawaii Legislature from considering a change in the numerical size of the Senate in drafting the Senate Reapportionment Plan. After all, the task before the Legislature was the proper apportionment of the Senate, and consideration of any factor designed to bring this about would not have been improper. Yet, the very fact that the Legislature chose to apportion the 25 members of the Senate impliedly suggests that the Legislature exercised its judgment to retain that numerical size of the Senate.

2. *Restrictions on changes in the House district boundaries.* Article III, Section 4 of the Hawaii Constitution provides for decennial reapportionment of the House of Representatives. It provides that the total number of Representatives shall be apportioned among the districts and that if upon any reapportionment, the total number of voters registered in any representative district is less than one-half of the quotient obtained by dividing the total number of registered voters by 51, then the "basic area" in which that representative district is located shall be redistricted. Appellant in No. 318 contends that this freezes the

existing representative districts in any reapportionment of the House, that the District Court's failure to invalidate this section of the Hawaii Constitution led to the "freezing" of the choice of the Legislature in the reapportionment of the Senate.

The drawing of district boundary lines, unless it leads to a disparity in the weight of the votes of the voters, does not in and of itself violate the Equal Protection Clause. As it will be pointed out, the drawing of the House district lines was based on constitutionally acceptable standards of compactness and contiguity and followed closely geographical, historical and natural lines.

To assume that the failure to invalidate this section limited the choice of the Legislature in the reapportionment of the Senate fails to take into account the power of the Legislature, had it chosen to do so, to propose constitutional amendments shifting the House boundary lines in drafting the Senate Reapportionment Plan. There is nothing in the record to indicate that the Legislature would not have arrived at the same result as the Delegates to the Constitutional Convention of Hawaii in the drawing of the House district lines, if Article III, Section 4 of Hawaii Constitution as now constituted was held invalid by the District Court.

Both the freezing of the numerical size of the houses in the Legislature and the freezing of the boundary lines for legislative districts are intended to prevent that very practice of gerrymandering which this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), cautioned against. To permit unlimited changes in the numerical size of the respective houses and district boundary lines at every decennial census is "little more than an open invitation to partisan gerrymandering." *Id.*, at 579.

"The various restrictions [prohibiting the division of a political unit unless it is entitled to two or more representatives and requiring districts to be compact and contiguous] are designed to accomplish two basic purposes. First, they are intended to reduce the influence of political factors in drawing legislative district lines. No criteria have been developed which can completely eliminate the political factors from the process of drawing legislative district lines. Second, these various limitations also tend to permit legislative districts to be made up of areas that have common or conflicting interests as the apportioning body may determine."[36]

The possibility of such gerrymandering was indeed in the minds of the Delegates to the Constitutional Convention when they "froze" the representative district lines. The Committee responsible for drafting the Legislative Sections of the Hawaii Constitution did not deem it advisable "to provide for complete redistricting of the State at the time of each reapportionment." (R. 350) To minimize further the possibility of gerrymandering the Constitutional Convention gave the task of reapportionment and re-districting, if necessary, to the Governor of the State. (R. 350)

The District Court properly left this judgment of the body politic intact in refusing to invalidate this portion of the Hawaii Constitution.

3. *Decennial reapportionment.* Article III, Section 4 of the Hawaii Constitution further provides that the House shall be reapportioned decennially. Appellant in No. 318 contends that this provision prevents the use of any other representation measure than the registered voter measure

---

[36] Advisory Commission on Intergovernmental Relations Report A-15, 55 (1962).

and should, therefore, have been ruled invalid by the District Court This assumes, of course, that the registered voter measure is not constitutionally acceptable, and that is the subject of discussion in another part of this brief.[37] It is to be remembered that the Hawaii Constitution was drafted in 1950. Pursuant to Section 4 of Article III, providing for decennial reapportionment, the Governor of Hawaii in 1959 reapportioned the House of Representatives among the eighteen districts. Since the Hawaii Constitution required the decennial reapportionment to be measured on the number of voters registered at the last preceding general election, the Governor necessarily took the 1958 registered voters count in reapportioning the House. Appellant in No. 318 suggests that basing decennial reapportionments on the registered voters measure, even if proper, would not reflect the "total population" of Hawaii, since the decennial census will always take place one year after the House has been reapportioned.

As the District Court noted, there is nothing invidious about the fact that the Hawaii decennial reapportionment of the House happens to fall one year before the decennial census. And, if the measure of population on the registered voters basis is constitutionally acceptable, the results of the census are hardly relevant in arriving at the population base for the purpose of Hawaii reapportionment.

4. *The District Court's failure to invalidate all portions of the Hawaii Constitution relating to the apportionment and reapportionment of both the Senate and House cannot be said to have made the task of the Legislature more difficult by limiting the choices in any reapportionment plan.*

---

[37]See pp. 95 to 109, *infra.*

There is nothing in the record to indicate that the Legislative action would not have produced an apportionment of the Hawaii Legislature substantially in the manner as the one now before this Court had the District Court invalidated all of Sections 2, 3 and 4 of Article III of the Hawaii Constitution. It would appear, that with the invalidation of these sections, if anything, the problems of the Legislature would have been compounded.[38]

VIII. THE DISTRICT COURT CORRECTLY HELD THAT "REGISTERED VOTERS" IS A CONSTITUTIONALLY VALID MEASURE OF "POPULATION" IN THE APPORTIONMENT OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE HAWAII LEGISLATURE.

The District Court in its February decision upholding the validity of the apportionment of the House of Representatives of the Hawaii Legislature held that the use of "registered voters" as the measure of "population" is constitutionally permissible. (R. 75, 238 F.Supp., at 476) Then in its amended March order, the District Court required the Hawaii Senate to be apportioned "on the basis of the number of voters registered in the 1964 general election." (R. 95) In its April decision, while holding that the Senate Reapportionment Plan was not acceptable, the District Court noted that the plan, based on the number of "registered voters" did conform "to the standards required under

---

[38]It is not clear whether the Appellant in No. 318 is contending that Section 5 of Article III of the Hawaii Constitution should also have been invalidated. Section 5 provides for tenure of office of Senators and Representatives. Tenure is surely just as much a part of the legislative make-up as districts and sizes of the houses and is often considered in constructing the state Legislature. The relative length of term was indeed considered by the Hawaii Constitutional Convention in drafting the constitutional provisions relating to the State Legislature (R. 350) and by the Hawaii Legislature in planning the reapportionment of the Senate. (R. 123, 134)

the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus [met] that one test of constitutionality." (R. 155, 240 F.Supp., at 727)

Contrary to the contention of Appellant in Case No. 318, the upholding of the "registered voters" measure of representation for both houses of the Hawaii Legislature was correct.

A. "Registered voters" is a permissible basis upon which the State Legislature may be apportioned in complying with the requirements of the equal-populations principle under the Equal Protection Clause.

The Equal Protection Clause protects "a person" against invidious discrimination. A complaint that one has been denied the equal protection of the laws, is a complaint that he has been invidiously discriminated against. As applied to State legislative apportionment problems, the alleged discrimination is that the complainant's vote is worth less than the vote of another. A complaint that one's vote is weighted unequally in comparison to the weight of the vote of another person implies that the complainant has the right to vote. Yet, not every person is entitled to vote in American and citizenship which he must meet to become eligible to democracy. There are qualifications such as age, residence vote. This Court held in *Gray v. Sanders*, 372 U.S. 368 (1963), that "States can within limits specify the qualifications of voters in both state and federal elections," and that "the Constitution indeed makes voters' qualifications rest on state law even in federal elections." *Id.*, at 379.

Thus, the focus of the Equal Protection Clause in legislative apportionment cases is the *qualified voter*. "A person" in this context means a person qualified to vote.

". . . all *qualified voters* have a constitutionally protected right to vote . . . and to have their votes counted . . ." Reynolds v. Sims, 377 U.S. 533, 554 (1964). (Emphasis added.)

The gist of the *Reynolds* case, and the companion state legislative apportionment cases, is that each qualified voter's vote must be substantially equal in weight to the weight of the votes of other voters. "Equality of voters" is the concern here of the Equal Protection Clause.

"[T]he Equal Protection Clause guarantees the opportunity for equal participation by *all voters* in the election of state legislators." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). (Emphasis added.)

"Once the geographical unit for which a representative is to be chosen is designated, *all who participate in the election* are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Gray v. Sanders*, 372 U.S. 368, 379 (1963). (Emphasis added.)

While fair and effective representation is the goal, equal representation is not the right protected by the Equal Protection Clause. What is protected is the right to vote on the part of qualified voters.

"It is not surprising that our Court has held that this Article [Article I, section 2, Constitution of the United States] gives persons *qualified to vote* a constitutional right to vote and to have their votes counted . . . No right is more precious in a free county than that of *having a voice in the election* of those who make the

laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). (Emphasis added.)

Fair and effective representation cannot be achieved, much less guaranteed, by legislative apportionment alone. As observed earlier, fair and effective representation depends on the structure of variety of inter-related factors.

"Representative government is in essence self-government through the medium of elected representatives of the people." *Reynolds v. Sims*, 377 U.S. 533, 565 (1944). To assume that a voter, when he casts his ballot, votes for a representative to represent the views of the non-voter is to assume too much. He votes for a representative whom he feels can best represent *himself* and *his* points of view. If representation is to find effective and meaningful expression, then surely voting is the primary way to achieve this. Those who fail to vote cannot find meaningful representation except in an indirect fashion, depending on the manner in which the various facets of government are structured. To grant direct representation to those who do not participate in the electoral process is to penalize those who affirmatively act to assure direct and effective representation of themselves.

The fact that not only voters are subject to taxes imposed by the Legislature, attend schools or otherwise enjoy the benefits provided by the state, or live in areas where legislative attention is required does not mean that every such person is entitled to representation. Otherwise, all persons, whether in institutions, aliens or out-of-staters, who for one reason or another pay taxes or are subject to the laws of the State, are entitled to representation and to participate in the electoral process to make that representation meaningful. Yet, this Court in *WMCA, Inc. v. Lomenzo*, 377 U.S.

633 (1964), noted that aliens are excluded from consideration for the purposes of legislative apportionment in the State of New York and apparently did not find anything invidious about it, and writers on apportionment and the States themselves exclude persons residing in institutions from the right to vote.[39]

While those who do not participate in the electoral process, to be sure, are just as much in need of the protection and care of the State, to insure that their voices are heard in the State legislative halls requires the structuring of the various facets and processes of government, a task better left to the political arm of government. Much of the determination of the political body will be influenced by needs and public policy considerations.

Then, too, in achieving fair and effective representation for all, the State must be constantly vigilant to insure the maximum opportunity for participation in the electoral process of the State in order that the citizens' qualifications to vote are not unconstitutionally or unnecessarily restrictive. But, this is a problem of voter-registration, not one of legislative apportionment, and is not the problem before this Court. (R. 73, 238 F.Supp., at 475)

The analogy to the United States House of Representatives which is apportioned on the basis of gross census population is not applicable to state legislative apportionment. The use of gross census population is specifically mandated by the Constitution of the United States.[40] No equivalent mandate can be found in the Constitution with respect to state legislatures. In addition, there is much to be said for basing representation in the United States House of Rep-

---

[39]See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS REPORT A-15, 30 (1962).

[40]U.S. CONST., Amend. XIV, § 2.

resentatives on gross census population, inasmuch as the states differ in voter qualifications. Thus as the Advisory Committee on Intergovernmental Relations concluded:

> "Any of the above measurements of population [straight population, qualified voters, registered voters, and actual voters] in the apportionment of one or both houses of a State legislature would appear to satisfy any Fourteenth Amendment requirement." [41]

B. The use of the census total population in Hawaii to measure "equal-population" tends to dilute the weight of the vote of voters in districts where a smaller number of nonvoters reside.

Equality in the weight of votes is a comparison of the weight of the vote of a voter against the weight of the votes of other voters. If a voter in one district is permitted to vote for two legislators simply because his district has two times as many people as a single-member district, although the voter populations of the two districts are numerically equal, the weight of the vote of the voter in the two-member district is two times as great as the weight of the voter in the single-member district. When a voter casts his vote, it is to be remembered that he expresses *his* choice for a representative to represent *his* views, not of others. The voter in a two-member district, by reason of the non-vote by one-half of the people in his district, thus receives the benefit of the weight of the votes which the non-voters would have had had they been voters. The electoral power of the voter in the two-member district is thus twice as great as the power of the voter in the single-member district. The weight of a voter cannot be equal to that of another, if the other is permitted to use the vote of a non-voter to select additional

---

[41] ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS REPORT A-15, 32 (1962).

representatives. But such is precisely the result in Hawaii if the census total population is used to measure equal-population among districts.

1. *Hawaii's census "total population" figure does not accurately reflect the number of citizen-residents and inhabitants of Hawaii.*

Hawaii has become one of the nation's largest complex of military bases. The United States' Census Bureau estimated that during the period between 1950 and 1962, the number of military personnel (not including dependents) rose from a low of 21,000 to a high of 79,000. (R. 388) In 1960, military personnel, not including dependents, numbered 47,267 (by the census estimate) or 54,000 (by the Defense Department's estimate) or 52,881 (by the report of local commanders to the State Department of Planning and Economic Development) (R. 393, 134) [42]

The military, by its nature, is highly mobile, and the number in Hawaii fluctuates violently as the need for military action demands. (R. 71) Yet, all of the military personnel and their dependents are included in the "total population" of Hawaii by the United States Bureau of Census. (R. 209) It includes all military personnel stationed ashore in Hawaii, on board ship which happened to be in Hawaii's port on the census date, and all of their dependents whether living in military housing or on military base or in areas normally inhabited by residents of Hawaii. All of them are included in the total population of Hawaii, regardless of their length of stay in Hawaii or its port, and regardless of their legal or voting residences.

---

[42]As stated in Defendant's Ex. A (R. 204, 392), the Bureau of Census takes the position that the discrepancy between its figure and the Defense Department's figure is attributable to misreporting of servicemen as civilians in the census.

In addition to its being one of the nation's largest complex of military bases, Hawaii is the focal point for thousands of tourists. In the census count, all tourists in Hawaii on the day of the count are recorded. (R. 209) Based on the statistics of the Hawaii Visitors' Bureau, there were approximately 10,000 tourists in Hawaii on the day the 1960 census was taken. (R. 210) To be sure, an attempt is made to reallocate the number of tourists to their home states and the number of reallocation is "substantially accurate," but the reallocation is not based on any census information and there is no certainty how many in 1960 were reallocated; "it is assumed that all of them were." (R. 209-10, 211)

Included in the census "total population" of Hawaii are also the aliens who are not eligible to vote (R. 208-09). In 1960, it is estimated that there were 51,316 persons 20 years and over who were not eligible to vote because of alienage. (397)

From the foregoing, it is clear that the "total population" figure based on the census is hardly a true measure of the number of citizen-inhabitants actually residing in Hawaii. Can it be seriously contended that all transients and temporary visitors in Hawaii should be entitled to representation in the State Legislature? If so, should they not be entitled to vote to make their representation fully meaningful and effective. Yet, the State has, within constitutional limitations against discrimination based on race or sex, power to determine voter qualification. *Gray v. Sanders*, 372 U.S. 368 (1963).

2. *To base Hawaii Legislative apportionment on "total population" would result in the election of a number of legislators in a number of districts with relatively small number of voters per legislator as compared to the number of voters per legislator in other districts.*

The proposed districting system for the City and County of Honolulu, based on census enumeration worked out by the expert Robert Schmitt (Plaintiffs' Ex. 8, R. 252 (unprinted)) graphically illustrates the inequity which will result if apportionment is based on "total population." The island of Oahu will be entitled under this proposal to 20 of the 25 State Senators, and to 40 of the 51 State Representatives (R. 250-51). The largest representative district in terms of "total population" will be that area which includes Schofield Barracks, and it will consist predominately, if not entirely, of military personnel. (R. 251) And, yet, this district in point of registered voters will be the smallest district on the island of Oahu. (R. 251) This means, of course, that a relatively small number of votes will elect a representative from this district, while it will take considerably more votes for the election of representatives in districts with smaller "total population." Indeed, under the proposed districting system based on "total population",, it is entirely possible, for example in the Hickam-Pearl Harbor area, to have a Representative District which would have almost no voters at all. (R. 275)

Thus, the electoral power of the voter who lives in a district with a large number of non-voters will be magnified, and will weight more heavily the vote of the voters residing in those districts than the vote of those residing in districts with a greater number of voters.[43] This is hardly the objective of the one man-one vote principle.

---

[43]See Silva, *Making Votes Count: Arguments Advanced for Basing Representation on Electors Turning Out Rather than Population*, 1963 NAT'L. CIVIC REV. 489. The author argues that it is more in keeping with the equal-populations principle to base representation on actual votes cast.

To require then that the Hawaii Legislative apportionment be based on "total population" would be highly unreasonable. Perhaps there is need for an approach which will liberalize the qualification of those in the military service and stationed here in Hawaii to enable more of them to become eligible to participate in the State's electoral process. But, this is not the question now before this Court.[44]

Davis v. Mann, 377 US. 678 (1964), did not hold that in all cases the military *must* be counted in determining the numerical population of the legislative districts. This Court in that case rejected the argument advanced that the Virginia apportionment was valid even though there was underrepresentation in certain areas because the underrepresentation resulted from the fact that those areas contained large numbers of military and military-related personnel. This Court's rejection of the argument was proper, since what was being attempted by the argument was to exclude the military from being counted in determining the districts' populations, when in Virginia, apparently all persons were to be counted in determining population, regardless of age, sex, occupation or otherwise. In such instance, to single out the military for exclusion constituted discrimination which, *without more being shown*, could not be constitutionally sustained, particularly when the policy of the State of Virginia was to foster and encourage voting by the military. This is not the case in Hawaii. By measuring "population"

---

[44]Appellant in Case No. 318 suggests that there has been discrimination against the military's right to vote in Hawaii. (GO Br. 65, n. 30) It is suggested that the Hawaii House is now apportioned on the basis of 1958 registered voter, and that the qualifications for voting in the 1958 election were established by the Organic Act of the Territory of Hawaii which prohibited voting by the military in Territorial elections. As found by the District Court, there is nothing in the Hawaii Constitution which per se excludes military personnel from establishing residence in Hawaii and become eligible to vote. (R. 73, 238 F. Supp., at 475) The matter of qualification to

on the "registered voter" basis, all persons, regardless of whether military or civilian, regardless of sex, race, occupation or age are counted in determining population, so long as they are registered to vote. The discrimination, if any, is one based on whether the person is registered to vote or not, and as demonstrated above, there is substantial reasons for the use of the registered voter basis.

There are other features in the *Davis* case to distinguish it from the Hawaii case. In the *Davis* case, there was no showing that the Legislature *in fact* took the military factor into account in allocating legislative representation, and, even if such persons were excluded in determining the populations of the districts, there was still a disparity in population among the districts.

C. There is a direct and reliable relationship between the number of civilian population in Hawaii and the ratio of registered voters to the civilian population is relatively stable.

If it is required that the voter registration figure parallel substantially the population figure of the State in order for the legislative apportionment to be based on the registered voter measure, this test is met in the Hawaii Legislative apportionment case.

The District Court found that the apportionment of the Hawaii Legislature on the basis of total population would produce substantially the same result as apportionment on the basis of registered voters. (R. 74) Thus, the District Court, pointing to Plaintiffs' Exhibit 14, Table 13 (R. 260, 372), stated that as between the total population basis and the registered voter basis, the margin of difference in the

---

become a voter is separate and apart from this case and was not before the District Court and is not now before this Court. Any member of the armed forces who qualifies and registers will, of course, be counted among the "registered voters" in determining the "population" of the legislative districts.

allocation of the number of legislators to the present senatorial and representative districts would be at the most two. The Appellant in Case No. 318, however, contends that this is not so and points to Plaintiffs' Exhibit 1 (R. 202, 339), and claims that the Tenth Representative District, for example, would be entitled to eight Representatives on the total population base and only four on the registered voter base.

The difference between Plaintiffs' Exhibit 14, Table 13 (R. 260, 372) and Plaintiffs' Exhibit 1 (R. 202, 339) arises from the fact that Plaintiffs' Exhibit 14 is based on "civilian" population, excluding military personnel (but not necessarily excluding military dependents), whereas Plaintiffs' Exhibit 1 is on the census total population, including all military personnel. As indicated above, it is rational and reasonable that the military who are not, at least, qualified voters be excluded in determining "population" base in the apportionment of Hawaii Legislature. In Plaintiffs' Exhibit 1 (R. 202, 339) the largest discrepancy in the number of legislator is in the Eighth, Ninth, Tenth and Eleventh Representative Districts and the Fourth and Fifth Senatorial Districts, and the reason for this is because these districts have the heaviest, if not the entire, concentration of military personnel stationed in Hawaii. (R. 391)

The finding of the District Court is in accord with the finding of the Constitutional Convention of the State of Hawaii. (R. 347-48) It is important to note that the Constitutional Convention's determination to use the registered voter basis rather than the total population basis was not simply because the convention found, as a practical matter, that the number of registered voters bore a reliable and fairly uniform relationship to total population, but also because the convention found that it was difficult to obtain citizen

population figure or total population figure which was broken down into desirable districts. While apportionment on the basis of "eligible" rather than actually "registered voters" may be desirable, these figures are not readily available and it would be extremely difficult at the present time to secure reliable figures for the military and military dependents. (R. 74, 221) Until such time that the Census Bureau can furnish the necessary data to enable a fairly reliable count of the "eligible voters," for the reasons stated above, it appears that the "registered voter" count is not only the best, but perhaps even necessary, in furthering the aim of equality of votes among the voters in Hawaii.

D. The "registered voters" measure does not discriminate against certain segments of the State's population.

Appellant in Case No. 318 contends that the "registered voters" measure of apportionment discriminates invidiously against (1) persons living in areas of low proportions of registration; (2) areas which have in the past received less representation than that to which they were entitled: (3) the poor and the communities in which they live; (4) the illiterate and the areas in which they live; (5) areas with a low median population age; and (6) the military and the areas in which they live. (GO Br. 56-67)

In the first place, Appellant's claim is, of course, based on the assumption that every person, whether a voter or not, is entitled to representation. This argument has been effectively disposed of in the earlier portions of this brief. (pp. 96 to 100, *supra.*)

In the second place, there is nothing in the record to substantiate Appellant's claim. The Appellant relies heavily on what he claims is the low voter registration figure for all those persons he mentioned as being invidiously discriminated against. The argument is that because they don't vote,

and thus because they are not counted in determining the "population" base, they are effectively left out of the process of representative government.

The District Court found that more than 87% of those eligible to vote in Hawaii were registered to vote in 1960. (R. 74, 238 F. Supp., at 475-76) (See Plaintiffs' Ex. 14, Table 5, R. 260, 364) The percentage figures used by Appellant are misleading.

1. It is claimed that the island of Oahu, which has been the most underrepresented island in Hawaii, giving rise to this case, has the lowest voter registration figure. It is claimed that only 51.6% of those 20 and over were registered to vote in 1960. But the figure 51.6% includes those who were *not eligible* to vote, by reason of military service, incompetents, alienage, etc. (R. 263-64) With the military and the bulk of the State's ill population and centers for institutional care being concentrated on the island of Oahu, is there any wonder that there were more of them included for Oahu in counting those 20 years and over, than for the other islands? The same table shows that of the *eligibles* on Oahu, 82.8% were registered to vote in 1960—close to that average of 87.1 for the entire State. (R. 364)

2. The voter registration figure for the poor and the communities in which they live is taken from Plaintiffs' Ex. 14, Table 6 (R. 260, 365). The figures on Table 6 are again misleading, for there is lack of explanation anywhere in the record as to exactly who is included within each median income level.

3. The allegation with respect to illiteracy is entirely without evidential support. There is nothing in the record to indicate the number of illiterates in the State and the

places within the State where they may be concentrated. The argument that illiterates are likely to congregate in specific geographic areas is without foundation. The District Court expressly found Hawaii to have an unusually literate citizenry. (R. 74, 238 F. Supp., at 476)

4. The arguments with respect to areas of low median population age and the military are speculative and without foundation. Is there really any factual foundation to the assertion that those with a larger number of children have the greatest need? The needs of the State and the relative importance of needs are matters of legislative judgment. Then, too, to assume that, because there are greater number of children in one district than another, the Legislature will take special consideration to meet the needs of that district is indulging in a great deal of assumption.

With respect to the military, as observed earlier, the question of the qualification of the military to vote is not before this Court. Voter registration procedure, it has been stated earlier in this brief, is indeed one aspect or facet of "representative government," and one of the ways in which representative government can be made more meaningful. But, there is nothing in the record in this case to indicate that there has been any voter discrimination because of military service, nor has this point been pressed in the District Court below.

IX. THE USE OF THE MULTI-MEMBER DISTRICTING SYSTEM FOR THE HOUSE OF REPRESENTATIVES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The major portion of this brief has been devoted to a showing that the proposed reapportionment of the Senate is constitutionally acceptable. Much of the arguments pressed

in favor of the validity of the Senate plan is applicable to the apportionment of the Hawaii House of Representatives. The language used in demonstrating the validity of the Senate plan has been at times broad enough to cover the apportionment of the House. In this part of the brief, however, the specific subject of concentration is the objections raised by Appellant in No. 318 to the apportionment of the House among multi-member districts.

This Court, in reviewing the validity of the proposed Senate Reapportionment Plan, must, indeed, review the apportionment of the House to determine whether the apportionment of the House has any inequities which are aggravated by the Senate Reapportionment Plan as to cast constitutional suspicion upon the apportionment of the entire Hawaii Legislature. *Maryland Committee v. Tawes*, 377 U.S. 656 (1964), *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

This part of the brief will demonstrate that the apportionment of the House of Representatives under Article III, Sections 3 and 4 of the Hawaii Constitution contains no disparities from the principle of equal-populations and that there has been no showing that the apportionment of the House otherwise contains inequities as to weight the votes of voters in one district any more than the votes of voters in other districts. In other parts of this brief, it has been demonstrated that the proposed reapportionment of the Senate contains no such inequities and that when the Legislature is viewed as a whole, it cannot be said that substantial inequities exist by reason of the reapportionment of the Senate as to render the resulting apportionment of the entire Legislature invalid under the Equal Protection Clause.[45]

---

[45]See pp. 85 to 89, *supra*.

A. The employment of multi-member districts for the House is grounded upon public policy considerations and judgmental decision made upon existing state of facts.

The selection of multi-member districts for the Senate was influenced by public policy determination made by the Hawaii Legislature that it would be in the interest of the State to foster the election of legislators oriented toward state-wide, rather than local, problems. The Legislature also took into account those relevant factors which are parts and parcels of any system of representative government.

The reasons for the creation of multi-member districts in the apportionment of the Hawaii House of Representatives are not clearly articulated in the proceedings of the Hawaii Constitutional Convention of 1950. Yet, a perusal of the proceedings affords some basis for concluding that the Constitutional Convention did indeed consider the relative merits of the single-member districting system versus the multi-member districting system. Thus, Standing Committee Report No. 92 in the Proceedings of the Hawaii Constitutional Convention states,

> "The proposal embodies what your Committee believes necessary or desirable in establishing the legislative department of the state government. Before arriving at its proposal your Committee studied the several proposals referred to it, as well as those provisions of the Hawaiian Organic Act, the Model State Constitution and the constitutions of several of the states pertaining to the legislature. Your Committee has decided to retain the framework provided in the Organic Act without substantial change, except in a few particulars." (R. 343)

Standing Committee Report No. 92 further suggests as a probable reason for the multi-member districts in the

House, its judgmental decision that the "present representation enjoyed by the neighbor islands should not, at least for the present time, be decreased." (R. 348) Under the provisions of the Hawaiian Organic Act in effect at the time of the Constitutional Convention, the House of Representatives was composed of 30 members, 18 of whom represented the neighbor islands and 12 of whom represented the island of Oahu. In its concern to structure the House of Representatives on the equal-populations principle, and yet retain the then representation enjoyed by the neighbor islands, the members of the Constitutional Convention resolved the House representational problem by increasing the number of representatives from the island of Oahu from 12 to 33. (R. 348)

Whatever the policy and judgmental decisions leading to the creation of multi-member districts in the Hawaii House of Representatives, it would appear, in line with the Equal Protection cases of this Court, that, unless it is patent on its face that the discrimination is based on race, sex or homesite, or unless it appears from the apportionment itself that there is substantial deviation from the equal-populations principle, if there is any state of facts which can justify the plan, it must be presumed that the members of the Hawaii Constitutional Convention devised that plan upon those state of facts. *McGowen v. Maryland*, 366 U.S. 420 (1961); *Morey v. Doud*, 354 U.S. 457 (1957).

As indicated with respect to the Senate Reapportionment Plan, there are any number of valid justifications, if justifications are needed, for the creation of multi-member districts. It is reasonable to assume that the Delegates to the Hawaii Constitutional Convention acted on substantially the same state of facts which prompted the Hawaii Legislature to create multi-member districts for the State Senate.

B. The employment of multi-member districts in the House of Representatives has not been demonstrated to result in any invidious discrimination.

1. The construction of multi-member Representative Districts was not arbitrary, or, at least, it was not shown to be arbitrary.

The present apportionment of the House of Representatives is based on the measure of registered voters. The last reapportionment of the House in 1959 was based on the 1958 voter registration. As thus reapportioned, the total number of Representatives is apportioned among the districts in compliance with the principle of equal proportions. (R. 65, 238 F. Supp., at 471) Thus, on its face, it cannot be said that the weight of the vote of a voter in one district is less than the weight of the votes of voters in other districts. Those districts which elect two times as many Representatives as a single-member district have two times as many registered voters in their districts as the single-member district.

Further, the representative district lines, as in the case of the proposed senatorial district lines, follow substantially historical, geographical and governmental lines and adhere to the principle of compactness and contiguity. While the representative district lines may not be as desirable as the proposed senatorial district lines (R. 325), nonetheless, unless it can be demonstrated that the representative district lines are invidious, their validity must be presumed. The District Court below did not find that the representative district lines were in any manner arbitrary or lacking in rationality.

Adherence to established geographical lines and the principle of compactness and contiguity, when coupled with the apportionment of the total number of Representatives on

the method of equal proportions, without more, cannot be said to discriminate against any voter invidiously, if at all. Geographical lines, compactness and contiguity and equal-populations, together with the "freezing" of the number of Representatives and the representative district lines enable the decennial reapportionment to take place with the fears of partisan gerrymandering reduced to its minimum.

2. There has been no showing that the multi-member districts of the House, by themselves, or in conjunction with the proposed multi-member districts of the Senate over-represent the larger multi-member districts or submerge the minorities in multi-member districts or denigrate majority rule.

As shown with respect to the senatorial districting plan, the fears expressed by the District Court and by Appellants in No. 318 are speculative at best. Overrepresentation, submergence of minorities and denigration of majority rule can occur in either single-member districts or multi-member districts.[46] These are, indeed, problems which occur in any system of representative government, and there is much need for constant vigilance on the part of the body politic, in the exercise of its political and policy judgment, to insure maximum opportunity for achieving fair and effective representation for all. But, the apportionment of the Legislature is not the sole guarantee of fair and effective representation. Much judgmental decisions are required in the structuring and employment of various factors and facets of government to achieve the ultimate in representative government.

Appellant complains that because of the *size* of one of the eighteen House districts, that district with six Representa-

[46]See pp. 54 to 62, *supra* and note 21, p. 62. *supra.*

tives, controls 12% of the House. If it does, it does so simply because it contains 12% of the registered voter population in the State. There is nothing invidious about this any more than an at-large district containing 100% of the population theoretically having 100% control. And, this Court has intimated that at-large elections are not prohibited by the Equal Protection Clause. *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 731, note 21 (1964). Even to assume that the six Representatives will control 12% of the House is to assume too much. It assumes that all six of them are of the same party or are all in the majority or otherwise vote together on all measures. This is an unlikely assumption. This Court held in *Fortson v. Dorsey*, 379 U.S. 433 (1964), that simply because a multi-member district is large, without more, cannot be said to be constitutionally defective, so long as the district contains its proportionate share of the populace to justify the number of legislators assigned to that district.

That the multi-member districting system in the House submerges minorities is, indeed, as Appellant admits (GO Br. 81), without proof in the District Court below. The arguments advanced to show that minorities are submerged are the traditional ones, which, as pointed out earlier in this brief, have never really been proven. The potential submergence of minorities occurs in any system of districting. Any system of districting, no matter how carefully or carelessly the district lines are drawn, will work to the advantage of some group and to the disadvantage of others.[47] The difficulty is in pin-pointing the groups which have been advantaged and which groups have been submerged in a given system of districting, and proof along this line is lacking in the records of this case.

That multi-member districting system of the House sub-

[47]See note 20, pp 61-62, *supra*.

verts majority rule, as in the case of the proposed reapportionment of the Senate, is devoid of facts. Neither single-member districting system nor multi-member districting system insures absolute majority rule.[48]

CONCLUSION

For the reasons stated, the decision and order of the District Court dated April 28, 1965, should be reversed and the proposed Senate Reapportionment and the apportionment of the House of Representatives should both be upheld as comporting with the requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

If, for any reason, either or both of the proposed reapportionment of the Senate and the apportionment of the House be held by this Court as not comporting with the requirements of the Equal Protection Clause;

(a) the decision and order of the District Court dated April 28, 1965, should be reversed insofar as it requires that one house, at least, of the Hawaii Legislature be apportioned on single-member districts, the legislative districts be homogeneous in their ethnic, socio-economic, racial, industrial and occupational complexion and no legislative district of either house have identical boundaries as a district of the other house; and

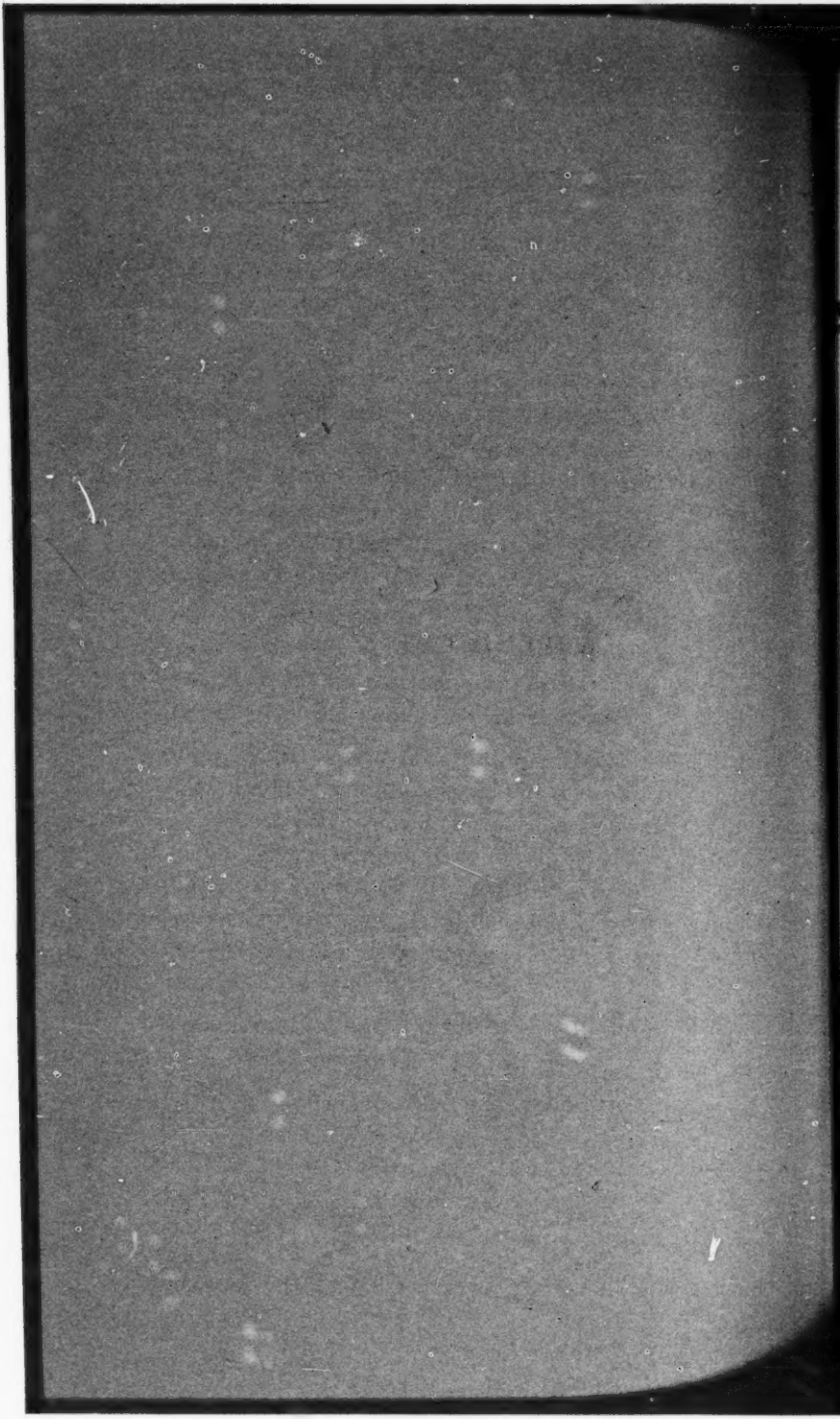
(b) paragraphs 3 and 4 of the decision and order of February 17, 1965, should be reversed.

Respectfully submitted,
KAZUHISA ABE
ROBERT KIMURA
YUKIO NAITO
Counsel for KAZUHISA ABE *et al.*

---

[48]See note 21, p. 62, *supra*.

APPENDICES



APPENDIX A

Constitutional and Statutory Provisions

1. Amendment XIV, Section 1, Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III, Sections 1, 2, 3, 4 and 5, Constitution of the State of Hawaii.

ARTICLE III

THE LEGISLATURE

Legislative Power

SECTION 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

Senate; Districts; Composition

SECTION 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

House of Representatives; Composition

SECTION 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

Reapportionment of House

SECTION 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representativs in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai,

Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

Mandamus

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the

governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

Election of Members; Term

SECTION 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

3. Article XVI, Section 1, Constitution of the State of Hawaii.

ARTICLE XVI

SCHEDULE

REPRESENTATIVE DISTRICTS

Description; Number of Members

SECTION 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeasterly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueleelua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona district to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Molokai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows:

Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as Ewa, (excluding Kunia and Waipio) and Waianae, more particularly described as follows:

Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along the Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the

Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, four representatives;

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows: from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said canal to the center

line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu for convenience herein referred to as Pauoa, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwest-

erly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Nuuanu to a point on the Koolau Range called "Puu Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly

along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahulu Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahulu Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on the Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) southwesterly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae

Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

4. Article XV, Constitution of the State of Hawaii.

ARTICLE XV

REVISION AND AMENDMENT

Methods of Proposal

SECTION 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

Constitutional Convention

SECTION 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments

to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

Election of Delegates

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

Organization; Procedure

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

Ratification; Appropriations

The convention shall provide for the time and manner in which the proposed constitutional revision or amend-

ments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such question, such majority constituting at least thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

Amendments Proposed by Legislature

SECTION 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

Veto

SECTION 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

5. Act 281, Session Laws of Hawaii, Regular Session 1965, Vol. 1 (H.B. 987)

A BILL FOR AN ACT

PROVIDING FOR THE PROVISIONAL REAPPORTIONMENT OF THE SENATE OF THE STATE OF HAWAII.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. *Senate; Districts; Composition.* The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

"Senate; Districts; Composition

Section 2. The Senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment, the senatorial districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: the island of Hawaii, three;

Second senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, two;

Third senatorial district: that portion of the island of Oahu consisting of the eighth representative district as described in the Schedule, Article XVI, Section 1, of the Constitution of the State of Hawaii, as amended, three;

Fourth senatorial district: that portion of the island of Oahu consisting of the ninth and tenth representative districts as described in the said Schedule and the first and the eighth precincts of the eleventh representative district as described in the governor's proclamation issued September 11, 1964, for the 1964 general election, four;

Fifth senatorial district: that portion of the island of Oahu consisting of the twelfth and thirteenth representative districts as described in the said Schedule and the second through seventh precincts, inclusive, and the ninth through twelfth precincts, inclusive, of the eleventh representative district, and the first through fifth precincts, inclusive, and the eighth, eleventh, fifteenth and sixteenth precincts of the fourteenth representative district as described in the said proclamation, four;

Sixth senatorial district: that portion of the island of Oahu consisting of the fifteenth representative district as described in the said Schedule and the sixth, seventh, ninth and tenth precincts and the twelfth through fourteenth precincts inclusive, of the fourteenth representative district as described in the said proclamation, four;

Seventh senatorial district: that portion of the island of Oahu consisting of the sixteenth and seventeenth representative districts as described in the said Schedule, four;

Eighth senatorial district: the islands of Kauai and Niihau, one."

SECTION 2. On or before June 1, of the year 1975, and of each tenth year thereafter, the governor shall reapportion the members of the senate in the following manner: The total number of senators shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of senators to which each basic area is entitled, such total shall be reapportioned among the one or more senatorial districts within each basic area on the basis of the number of voters registered at the last preceding general election within each of such senatorial districts and computed by the method known as the method of equal proportions, no senatorial district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any senatorial district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the senate is entitled, then, as part of such reapportionment, the basic area within which such senatorial district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new senatorial district therein shall be more than one-half of such quotient, provided, however, that there shall be at least one senatorial district in each basic area.

Upon completion of the reapportionment of the senate as provided herein, the governor shall issue a proclamation showing the results thereof.

Except as otherwise provided hereinafter, the initial reapportionment shall be effective for the election of members to the senate in 1976 and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect. Except as otherwise provided hereinafter, any subsequent reapportionment shall be effective for the election of members to the senate in the year next following such reapportionment and shall remain in effect for succeeding senatorial elections until the next reapportionment takes effect.

An incumbent senator whose term of office does not expire until the second general election following the date of the proclamation, including any such senator whose seat has been apportioned to another district by reapportionment, shall be allowed to complete his four-year term; provided that when the seat of such holdover senator has been reapportioned to another district, the election to fill the new seat in the district to which such seat has been newly apportioned shall not be held until the time of the second election following such proclamation.

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

SECTION 3. The terms of all members of the Senate elected or appointed prior to the general election of 1966 shall terminate on the date of the general election of 1966.

Members of the senate elected at the general election of 1966 shall be divided into two classes.

Members of the first class shall hold office for a term of four years beginning with their election and ending on the day of the second general election held thereafter.

Members of the second class shall hold office for a term of two years beginning with their election and ending on the day of the next general election held thereafter.

Upon the expiration of the aforesaid terms of office of members of the respective classes, the term of office of their successors shall be four years.

Of the members to which each senatorial district is entitled, one-half shall be members of the second class. If the total number of senators to which a senatorial district is entitled is not an even number, the number of members of the first class in such district shall be the quotient of said total number divided by two, rounded off to the next whole number. The remainder shall be members of the second class. Membership in the first and second classes shall be determined by the number of votes cast for each senator in such district. The first class shall consist of those senators, in number corresponding with the number of members of the first class to which such district is entitled, who are elected with the highest number of votes from such district. The remaining senators elected shall constitute the second class.

The senator from a senatorial district that is entitled to one senator shall automatically be a member of the first class.

SECTION 4. This Act shall take effect upon approval by the Governor of the State of Hawaii and by the United States District Court for the District of Hawaii and shall remain in effect until superseded by constitutional amendment; provided that the regular election of 1966, shall be the first election held pursuant to the provisions herein.

APPENDIX B

Memorandum to Judge Pence from Judge Beeks

MEMORANDUM

TO: Judge Pence DATE: March 31, 1965

FROM: Judge Beeks

SUBJECT: *Holt v. Richardson*

I discussed your proposed Decision and Order on Senate Reapportionment Plan of March 18, 1965, and your notes accompanying the same, in a telephone conference with Judge Jertberg on March 29th. Judge Jertberg, because of the fact that he was in Los Angeles without a secretary, asked me to convey to you our joint views, which are as follows:

1. Inasmuch as the Senate Reapportionment Plan of March 18, 1965, is not formally before us, we do not think that any decision and order should be filed because such decision and order would be purely advisory in nature.

2. We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor. There may very well be valid reasons for one or two 2-member districts in the neighboring islands but we perceive no justification whatsoever for other than single member districts on the Island of Oahu, particularly the heavily populated areas thereof.

We have no objection whatsoever to your making our views, as above expressed, informally known to all of the parties but we are opposed to the entry of a written decision and order.

I again discussed this matter with Judge Jertberg, who is now back in Fresno, this morning, read him this memorandum and he signified his approval and concurrence.

It is our suggestion that you discuss the subject matter of this memorandum with counsel for all parties immediately upon receipt of same (I hope you receive it tomorrow) and thereafter arrange a conference call with both of us (Judge Jertberg will be in Fresno) at noon your time on Friday.

cc. Judge Jertberg
Fresno, Calif.